92-1273

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SOUTHVIEW ASSOCIATES, LTD.,
SOUTHVIEW AT STRATTON PARTNERS,
Petitioners

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD; FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

A. JAY KENLAN, ESQ.
Counsel of Record
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.
71 Allen Street
Rutland, VT 05702-0578
(802) 773-3300
Attorneys for Petitioners
Southview Associates, Ltd.,
Southview at Stratton Partners

QUESTIONS PRESENTED

I. Does the denial of Petitioners' application for a land use permit based solely on the fact that the development and use of Petitioners' property would exclude deer from the property constitute a taking of Petitioners' fundamental right to exclude others from their property in violation of the Fifth and Fourteenth Amendments of the United States Constitution and contrary to this Court's decision in *Nollan v. California Coastal Comm'n*?

II. By requiring Petitioners to leave half of their property in "substantially its natural state" as a condition of permitting any development of the remainder of Petitioners' property, have Respondents deprived Petitioners of all beneficial use of half of their property in violation of the Fifth and Fourteenth Amendments of the United States Constitution and contrary to the Court's decision in *Lucas v. South Carolina Coastal Council*?

III. Under the Court's decision in *Williamson v. Hamilton Bank*, does the absence of any "reasonable, certain or adequate procedures" under Vermont law for obtaining compensation for the taking of Petitioners' property by Respondents deprive Petitioners of rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution?

PARTIES TO THE PROCEEDING

The parties listed in the caption, and no others, were parties to this action in the United States Court of Appeals for the Second Circuit.

PARENT COMPANIES AND SUBSIDIARIES

There are no parent companies or subsidiaries of Southview Associates, Ltd. or Southview at Stratton Partners.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Southview Associates, Ltd. and Southview at Stratton Partners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DECISIONS BELOW

The Decision of the United States District Court for the District of Vermont, dismissing Petitioners' Complaint is reported at 782 F.Supp. 279 and is reprinted in the Appendix of this Petition at App. B1 through B9. The Decision of the Court of Appeals for the

Second Circuit is reported at 980 F.2d 84 and is reprinted in the Appendix at App. A1 through App. A51.

JURISDICTION

Petitioners brought suit in the United States District Court for the District of Vermont for declaratory and injunctive relief, pursuant to the provisions of 42 U.S.C. § 1983, alleging, *inter alia*, that application by the Respondents of certain provisions of Chapter 151 of Title 10 of the Vermont Statutes Annotated, commonly known and referred to throughout this Petition as Act 250, deprived Petitioners of certain fundamental property rights and constituted a taking of Petitioners' property without any reasonable, certain or adequate remedy for obtaining compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. On December 6, 1991, the District Court dismissed Petitioners' Complaint.

Petitioners appealed the District Court's dismissal to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1291. On October 30, 1992, the Court of Appeals affirmed the decision of the District Court.

Jurisdiction of this Court is based upon federal questions raised in this case under 28 U.S.C. §§ 1331 and 1343 and is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED

This case raises questions under the Due Process and Just Compensation provisions of the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment of the United States Constitution. The Constitutional provisions, statutes, regulations and rules at issue in this case are reprinted in Appendix G.

STATEMENT OF THE CASE

During the winter of 1981-1982 and the spring of 1982, Petitioners investigated the availability of land in the Stratton, Vermont area for the purpose of developing a planned residential subdivision in proximity to the extensive skiing, golfing and other recreational opportunities in the Stratton area. Petitioners knew that the type of development which they were contemplating would require the issuance of a land use permit under Act 250[1]. Petitioners also knew that, of the ten criteria of Act 250 which Petitioners would have to satisfy, one of the most limiting criterion for rural development was Criterion 8 (Vt. Stat. Ann. Tit. 10, § 6086(a)(8)), which severely limits development on sites containing "necessary wildlife habitat,"

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[1] Act 250 jurisdiction applies, *inter alia*, to all land subdivisions involving the creation of 10 or more lots (App. G1), the construction of housing projects with ten or more units (App. G3) or the construction of a road if the road is to serve five or more parcels of land or is more than 800 feet in length (App. G4). The subdivision and development activities contemplated by Petitioners would have been subject to Act 250 jurisdiction under one or more of the foregoing jurisdictional determinants. Applications for Act 250 permits are submitted to and reviewed by one of nine District Environmental Commissions (in this case, the District II Environmental Commission, referred to in this Petition as the "Commission"), and decisions of the Commission are appealable to the Vermont Environmental Board (the "Board"). The Board conducts a *de novo* review of issues raised on appeal. Respondents in this case are the members of the Vermont Environmental Board.

as defined in Vt. Stat. Ann. Tit. 10, § 6001(12). App. G1. Among the site conditions which have been determined to constitute "necessary wildlife habitats" are areas of dense softwood cover which provide shelter for local deer populations during periods of severe winter weather, commonly referred to as "deeryards"[2]. In virtually all cases, if a proposed development site is determined by the Department of Fish and Wildlife (the "Department") of the Vermont Agency of Natural Resources (the "Agency")[3] to contain a deeryard, an Act 250 permit will be denied unless the applicant demonstrates, to the satisfaction of the Commission or the Board, that the proposed development will not interfere with the continued use and occupation of the deeryard by the local deer population.

One of the properties investigated by Petitioners was an 88-acre parcel of land located within the Towns of Stratton and Jamaica, Vermont (the "Southview Property"), owned by Cersosimo Lumber

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[2] White tailed deer are neither a threatened nor an endangered species in Vermont. As a result of their natural vitality and adaptability, and the game management practices of the Vermont Department of Fish and Wildlife, deer survive killing of an unlimited number of male deer each Fall, and the periodic killing of does and fawns, for the economic benefit of the State and the enjoyment of hunters. App. F16. In its decision denying Petitioners an Act 250 permit, the Environmental Board concluded that "[t]he existence of the deer in this area provides an opportunity to the public to hunt and observe deer and provides the more intangible benefit of knowing that the deer exist." App. D12. The issue of deeryard protection in this case is not an issue of preservation of a threatened or endangered species; it is a game (and economic resource) management issue. Here, the State is acting in its enterprise capacity to provide food and shelter for an admittedly valuable State resource. App. F16. Petitioners acknowledge that the public derives a benefit from the State's management of the deer herd. Petitioners object, however, that they are being forced to submit to the occupation of their property for this purpose, particularly in the absence of any means of recovering compensation for the use of their property by the State.

[3] The Vermont Agency of Natural Resources is a statutory party to the Act 250 permit review process and is represented in permit application involving deeryards by the Department of Fish and Wildlife.

Company, Inc. Prior to executing a purchase and sale contract for the purchase of the Southview Property, Petitioners conducted a comprehensive preliminary investigation of the property, including a review of the Deer Yard Maps prepared and provided by the Department, to determine whether the Southview Property contained any deeryards. According to the Deer Yard Maps provided by the Department, no deeryards were located on the or in the vicinity of the Southview Property[4]. App. F6-7.

Petitioners undertook a thorough pre-purchase evaluation of the property. Petitioners did everything reasonably possible to ensure that, in selecting, purchasing, planning and investing in a development, the property selected would not be subject to development limitations, particularly with respect to deeryards. As a result of its pre-purchase investigations, Petitioners determined that the Southview Property would be suitable for a planned residential subdivision, consisting of 78 building lots, approximately 1,500 feet of road and a community sewage collection, treatment and disposal system.[5]

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[4] The Department of Fish and Wildlife prepares Deer Yard Maps for all towns in the State of Vermont, designating on the Deer Yard Maps the significant deer wintering areas in each town. App. F5. The Deer Yard Maps are prepared expressly for the purpose of making land use planning decisions. App. F7. The Deer Yard Maps prepared by the Department for the Towns of Stratton and Jamaica and provided by the Department to Petitioners indicated that no deeryards were located within the boundaries of the Southview Property nor in the vicinity of the Southview Property. App. F7.

[5] As a result of their pre-purchase investigation, Petitioners determined that the predominant land use in the area in which the Southview Property is located is second-home residential development, essentially similar to the Petitioners' development plan. Several of the similar developments identified by Petitioners were in the same area of softwood cover and included portions of the same 280-acre deeryard subsequently designated by the Department as involving Petitioners' property, and had been granted Act 250 Permits by the Commission. App. F3. The zoning regulations and the town plans for the Towns of Stratton and Jamaica, and the Windham County Regional Plan designated the Southview Property as suitable for Petitioners' development. App. F4.

On June 3, 1982, Petitioners purchased the property from Cersosimo Lumber Co., Inc.

In the spring of 1983, as part of the investigation of the Southview Property for suitable sewage disposal sites, the Agency advised Petitioners that virtually all of the proposed development was within a deeryard. App. F8. This was the first notice Petitioners had that either the Department or the Agency would take the position that the Southview Property contained deeryards. In a letter to Petitioners dated April 29, 1983, App. F8, [James J. DiStefano], the District Wildlife Biologist for the Department advised Petitioners that the Department had determined "all the project acreage contains, or is central to, critical habitat" and that the Department "will oppose any permit application [for the Southview Property] through the Act 250 process." App. F8.

Between the fall of 1983 and the winter of 1984-1985, Petitioners revised their development plans to reduce the number of dwelling units from 78 to 33 dwellings. Petitioners also planned to remove as much of the development as possible from the deeryard. Because the deeryard bisects the Southview Property, it was necessary to cross a portion of it with the interior roadway of the subdivision. None of Petitioners' revisions were satisfactory to the Department, nor were they sufficient to discourage the Department's opposition in the Act 250 permit process[6].

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[6] Even though, as the Court of Appeals observes, the Commission and the Board, and not the Department, make the final determination of the presence of necessary wildlife habitat on a project site and the impact of development on such habitat, in practice, in virtually all cases where the Department identifies a deeryard on a project site, an Act 250 permit will be denied or severely conditioned based upon the position taken by the Department. App. F18.

In February, 1985, Petitioners submitted Act 250 permit application #2WO634 to the Commission. During the hearings held by the Commission between February, 1985 and April, 1986, the Department contended that the Southview Property contained 44 acres of previously-unmapped deeryard. The Commission found that the proposed development satisfied all of the Act 250 criteria except Criterion 8 with respect to the deeryard identified by the Department, App. D1, F10, however, based solely on the Department's concern about the impact of the Petitioners' proposed development on the deeryard, the Commission denied Petitioners' Act 250 permit application. App. E13.

Petitioners appealed the Commission's denial of the permit to the Vermont Environmental Board. The only contested issue before the Board was the impact of the proposed development on the deeryard. In its decision denying Petitioners' appeal, the Board found that 44 acres of Petitioners' property was necessary wildlife habitat. App. D4. The Board also found that, as a consequence of Petitioners' development, "[t]en acres of the critical deer wintering habitat will be destroyed by the development. The secondary impacts of the development will likely affect the deer in a larger area by causing them to avoid using portions of the habitat." App. D5. According to the Board, "[w]ithout the use of the critical softwood cover that currently exists on the Southview property, the deer are likely to be required to seek shelter in inferior cover that may provide inadequate protection from winter snow and winds." App. D11.

While the Board observed that "[t]he State testified that there were several alternative sites [on the Southview Property] that could be developed with much less impact on the deeryard", App. D13, it is clear from the Board's decision that no development would be permitted anywhere within the 44-acre deeryard, or anywhere else

on Petitioners' property if such development would have the effect of discouraging the deer from occupying the 44 acres of deeryard.

A timely appeal was taken by Petitioners to the Vermont Supreme Court. On December 1, 1989, the Vermont Supreme Court affirmed the Board's decision. App. C1. In its decision, the court cites with approval the Board's rationale that Petitioners' development cannot be approved if it is found to have the effect of discouraging the deer from continuing to occupy the deeryard located on Petitioners' property. App. C2, C7.

Following the Vermont Supreme Court's denial of Petitioners' appeal, Petitioners brought suit in Federal District Court for the District of Vermont, under the provisions of 42 U.S.C. § 1983, to enjoin Respondents from depriving Petitioners of their fundamental right to exclude the deer from the Southview Property, and to enjoin Respondents from depriving Petitioners of all beneficial use of all or part of the Southview Property.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331, 1332 and 1343. Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

While the Court of Appeals engaged in a lengthy "ripeness" analysis, this is not a "ripeness" case; this case arises out of Respondents' deprivation of Petitioners' fundamental right to exclude others, including deer, from its property, and the complete taking by Respondents of Petitioners' property without providing to Petitioners any reasonable, certain or adequate means of compensation. The decision of the Court of Appeals is in conflict with decisions of this Court with respect to three important federal questions concerning the extent to which persons acting under color of law may interfere with, impair or take property rights.

First, do Respondents, acting under color of State law, violate Petitioners' fundamental right to exclude others from their property by denying land use permits for the use of property solely on the basis that such use will have the effect of excluding deer from the property? While this Petition arises out of the actions of the named Respondents in applying Criterion 8 of Act 250 to deny Petitioners a permit for the residential development of their property, the actions of these Respondents may be fairly said to be representative of the actions of regulatory agencies throughout the country each time they deny or restrict the use or development of private property because wildlife using habitat on the property would be discouraged from continuing to occupy such habitat because of proposed use or development of the property.

Second, have Respondents deprived Petitioners of all value of 44 acres of their property by requiring, as a condition of issuing any permit for development of any portion of Petitioners' property, that Petitioners accept the "burden" of leaving 44 acres of their property substantially in their natural state, in perpetuity, for the benefit of the State's deer herd? The Court of Appeals' decision, if allowed to

stand, would virtually eliminate the need for government agencies to act through eminent domain powers to acquire title to private lands determined to be wildlife habitat, or to acquire valuable conservation restrictions, easements or development rights from any property owner unfortunate enough to need a land use permit for the use or development of their property.

Third, has government discharged its duty to provide a reasonable, certain and adequate means of obtaining just compensation if it effects a taking of property, but leaves the property owner to face the arduous and uncertain task of making state constitutional law in order to obtain compensation? If government has the power to effect such a taking by regulation, does it not have an equal and concomitant responsibility to provide a remedy for such taking? Does the term "Just Compensation" refer only to the amount of compensation to be paid, or does the concept of justice require that government provide some reasonably clear and accessible means to obtain compensation? Based upon the Courts decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), the States obligation to provide "an adequate procedure for seeking just compensation" *Id.* at 195, is not satisfied by simply pointing the property owner in the direction of the constitution and requiring him or her to undertake the formidable task of developing a constitutional remedy each time the State effects a taking.

I. BY DENYING PETITIONERS A PERMIT SOLELY ON THE BASIS THAT DEVELOPMENT OF PETITIONERS' PROPERTY WOULD EXCLUDE DEER FROM A PORTION OF PETITIONERS' PROPERTY, RESPONDENTS HAVE VIOLATED PETITIONERS' FUNDAMENTAL RIGHT TO EXCLUDE OTHERS FROM THEIR PROPERTY

This Court has established, as a basic tenet of land use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property, and the right to evidence such exclusive ownership and possession by excluding others from one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies or persons acting under color of law deprive the owner of property of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id.*

Contrary to the clear and unambiguous decisions of this Court, the Court of Appeals has determined that, by simply applying for an Act 250 permit and, in Judge Oakes' view, seeking the "benefit" of the permit process, Petitioners have, as a matter of law, waived their constitutionally-protected property rights. Moreover, in its decision, the Court of Appeals has established, as its rule of law, that a land use regulation which is applied to require a property owner to submit to the continued physical occupation of their property as a condition of obtaining a land use permit does not result in the taking of the owner's property or the deprivation of the owner's fundamental right to absolute and exclusive ownership and possession of the property. App. A21. The decision of the Court of Appeals does such violence

to settled law, as expressed in precedent decisions of this Court, that it must be reversed.

A. The Act Of Applying For A Land Use Permit Does Not, In And Of Itself, Require Petitioners To Surrender To Respondents Their Constitutionally-Protected Right To Exclude Others, Including Deer, From Their Property

Judge Oakes, writing for the Court of Appeals, concludes that "[h]ere, even if the Board's action were a permanent physical occupation, there was no government compulsion. Just as the mobile home park owners voluntarily rented their land in *Yee v. City of Escondido*, ___ U.S. ____; 60 U.S.L.W. 4301 (April 1, 1992), and, in so doing, engaged in an activity that subjected them to the effects of the rent control ordinance, Southview voluntarily proposed to construct a residential subdivision project and, in so doing, engaged in an activity that subjected it to the Act 250 Permit process." App. A21 (citation omitted). According to the hypothesis put forth by Judge Oakes, property owners must be prepared to surrender their property rights for the privilege of seeking a land use permit.

Contrary to the conclusions of the Court of Appeals, this Court has determined that the submission of a permit application does not, as a matter of law, constitute a waiver by the property owner of his important and fundamental property rights. The "voluntary relinquishment" theory advocated by Respondents, and upon which the Court of Appeals based its decision, was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In response to Teleprompter's suggestion that the law requiring residential landlords to submit to cable installations was "simply a permissible regulation of the use of real property" *Id.* at

438, this Court held that the right of a property owner to make otherwise-lawful use of their property "may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land may not be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

The Court of Appeals advances what might be characterized as an "additive" theory of land use regulation, that is, that government "adds to" property rights by granting permits to property owners for development of their property. However, the proposition that an applicant for a land use permit is seeking a "benefit" from government, and that, as a condition of conferring such a benefit, government can exact from the applicant any concession which government deems to be in the public interest, has been expressly rejected by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987). In *Nollan*, this Court stated that:

> [T]he right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as [a] voluntary "exchange". *Nollan*, 483 U.S. at 833 n.2.

The Court of Appeals undertook an extensive analysis of this case under the Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), however, *Yee* is clearly distinguishable from and is not

applicable to the facts of this case.[7] This Court, in reaching the conclusions which distinguish *Yee* from *Loretto* and *Nollan*, relied upon the fact that, by engaging in the mobile home rental business, the Yees were presumed to have voluntarily submitted themselves to the reasonable regulation of the mobile home rental business, including the rent control provisions of the Mobile Home Residency Law. This Court observed, however, that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 112 S. Ct. at 1528.

Petitioners acknowledge the authority of Respondents to regulate the use and development of their property under the provisions of Act 250, however, Respondents and the Court of Appeals "go too far" when they allow the taking of Petitioners' fundamental property rights in the process of an otherwise legitimate land use permitting scheme. This Court cannot let stand a decision by a Court of Appeals which grants to permitting authorities a license to demand the surrender of fundamental property rignts whenever the property owner has the misfortune to fall within the jurisdiction of the multitude of federal, state and local permitting programs which exist throughout this country.

The conflict between the decision of the Court of Appeals and the clear statements of the law expressed in the decisions of this Court underscores the need for this Court to restate and clarify the

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[7] The Court of Appeals declined to distinguish the facts of this case from *Loretto* and *Nollan*, and chose instead to base its analysis on *Yee v. City of Escondido*. *Yee*, however, is readily distinguishable from this case on its facts; the Yees chose to engage in the mobile home park rental business and, therefore, became subject to the reasonable regulation of that business by the City of Escondido. Petitioners have no more elected to engage in the deer husbandry business than Mrs. Loretto was in the television business, or the Nollans were in the business of providing accommodations to beach walkers.

protection which it has previously afforded to fundamental rights of property owners in the permitting process. If the decision of the Court of Appeals is allowed to go unchallenged, there may well appear over the doorways of the offices of zoning administrators and land use regulators throughout the country:

Lasciate ogni speranza, voi ch' entrate[8]

B. Respondents' Deprivation Of Petitioners' Right To Exclude Others, Including Deer, From Petitioners' Property, Is A Taking By Respondents Of Petitioners' Fundamental Property Rights And Gives Rise To Both A Substantive Due Process Claim And A Taking Claim Under The Fifth And Fourteenth Amendments Of The Constitution

The decision of the Court of Appeals is in conflict with recent decisions of this Court which confirm that the right to exclude others from one's property is a right so fundamental to our notion of private property that any interference with that right by government or by persons acting under color of State law is a taking, without regard to the degree of the interference, the economic effect of the interference, the extent of other rights retained by the property owner, or the benefits which might be derived by the public as a result of such interference.

It is not disputed by Petitioners that the deer occupy their property, or that the proposed development of the Southview Property might exclude some or all of the deer from the 44 acres of deeryard identified by Respondents. Nor is there any question that the sole reason that Petitioners were denied a permit to develop their

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[8] "All hope abandon, ye who enter in"; Dante: *The Divine Comedy*, "Inferno" III. ix.

property was the potential exclusion of deer from the 44-acre deer-yard. Respondents have required Petitioners to submit to the permanent physical occupation of their property by the deer under any circumstance where Petitioners will require an Act 250 Permit to undertake development of any portion of their property.

In *Kaiser Aetna v United States*, 444 U.S. 164 (1979), the Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80. in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court emphasized that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner". *Id.* at 434-35 (footnote and citation omitted).

Although in *Loretto*, the Court recognized the "broad power [of the States] to regulate housing conditions in general and the landlord-tenant relationship in particular" *Loretto*, 458 U.S. at 440, the Court also recognized the distinction between rent control cases (such as *Yee)* and physical occupation cases. "In none of [the housing regulation] cases however, did the government authorize the permanent occupation of the landlord's property by a third party." *Id.* at 440 (emphasis added)

Equally compelling and even more relevant to Petitioners' position is *Nollan*, where this Court stated that:

> [t]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property". In *Loretto* we observed that where governmental action results in "[a] perma-

> nent physical occupation" of the property by the government, itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. (Citations omitted).

Nollan, 483 U.S. at 831-32.

While the exercise by Petitioners of their right to exclude the deer from their property is incidental to the proposed development of their property, it is no less important and fundamental to them than it was to the Nollans, and Respondents' interference with that right is no less objectionable. To say, as Judge Oakes has, that the involuntary relinquishment by Petitioners of portions of their property to provide habitat and shelter for the State's deer herd "does not constitute a taking of a property interest" but rather a "mere restriction on use" is to "use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831.[9] Had Respondents simply required Petitioners to dedicate a portion of

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[9] By way of analogy, were the government to deny a land use permit to the owner of property occupied by homeless persons on the basis that the proposed use of the property would discourage the homeless persons from continuing to occupy the property, there is little doubt that this Court would find that a taking had occurred. "It is the nature of the intrusion which is determinative--i.e. that it deprives the owners of their rights to possession and exclusion--not the beneficial purpose of the regulation or the extent of the police power which authorizes it." *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059, 1064 (N.Y. 1989).

their property as a game preserve for the State's deer herd, rather than refusing to grant an Act 250 permit unless Petitioners made provision for the deer to continue to occupy the deeryard on Petitioners' property, such action by Respondents would unquestionably have been a taking under the Court's rationale in *Nollan*.

In dismissing Petitioners' Complaint, Judge Billings concluded that no deprivation of Petitioners' fundamental rights or violation of Petitioners' substantive due process rights had occurred because Petitioners retained "numerous possessory rights in the property." App. B5. The affirmation of the District Court's decision by the Court of Appeals underscores the conflict between the Second Circuit's view of the law and this Court's conclusion that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436. In *Loretto*, the Court acknowledged that the physical occupation was "minor". *Loretto*, 458 U.S. at 421. However, the Court concluded that a physical invasion could be a taking "even if [the wires] occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Loretto*, 458 U.S. at 430.

The Court, in *Nollan*, reaffirmed its rationale in *Loretto* by stating "our cases universally have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35) (emphasis added). One need only compare the very limited extent of the "physical invasions" which were held to be sufficiently intrusive to infringe upon the fundamental rights of the property owners in *Loretto* and *Nollan* to the forced occupation of half of Petitioners' property by the State's deer herd to conclude that the actions of the Respondents in this case resulted in a significantly

greater invasion of Petitioners' property than the Court found to be constitutionally offensive in *Loretto* and *Nollan*.[10]

In this case, the Court of Appeals has decided an important federal question of fundamental property rights in a manner which clearly conflicts with applicable decisions of this Court. It is important, both to protect the rights of Petitioners and to secure the fundamental rights of all property owners from unwarranted incursions by government regulatory agencies, that this Court settle the questions raised in this Petition. This Court's decisions in *Loretto* and *Nollan* clearly establish that it is the fact of the forced permanent physical invasion, not the degree of the invasion or the identity of the interlopers that is the determining factor. The decision of the Court of Appeals is inconsistent and irreconcilable with the principles of fundamental property rights established by the Court in *Loretto* and *Nollan*. If allowed to stand, the decision of the Court of Appeals will cast great doubt upon the soundness of those decisions.

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[10] The right to exclude "others" from one's property is not limited to television cable or beach walkers. In *Christy v. Hodell*, 857 F.2d 1324 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that it was constitutionally permissible to prevent the plaintiffs from shooting endangered grizzly bears which had been killing plaintiffs' sheep. *Id.* at 1331. Nevertheless, the court recognized that regulations were within constitutional limits because they "do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears." *Id.*, including the fencing of the property to exclude the bears. Justice White, in his dissent to the Court's denial of certiorari in *Christy v. Lujan*, 490 U.S. 1114 (1989), observed that "perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115.

II. BY REQUIRING 44 ACRES OF PETITIONERS' PROPERTY "TO BE LEFT SUBSTANTIALLY IN THEIR NATURAL STATE" AS A CONDITION PRECEDENT TO PERMITTING THE DEVELOPMENT OF ANY OTHER PORTION OF PETITIONERS' PROPERTY, RESPONDENTS HAVE DENIED PETITIONERS ALL PRODUCTIVE OR ECONOMIC USE OF 44 ACRES OF THEIR PROPERTY, WITHOUT COMPENSATION

Respondents designated 44 acres of Petitioners' property as deeryard, and declared, throughout their decision denying Petitioners Act 250 Permit for development of the Southview Property, that the only potential development opportunity which Respondents would allow Petitioners to pursue was the "possibility" of "less intensive development in other areas of the [Southview Property]" App. A28, that is, areas of the property other than the 44-acre deeryard. Even then, development would be permitted only to the extent that such development did not disturb the deer occupying the 44-acre deeryard. While there may remain some question as to the economic effect of the development limitations imposed by Respondents on the "other areas" of the Southview Property not included in the deeryard[11], the decision of the Court of Appeals leaves no doubt that, in its view, Petitioners can be compelled by Respondents to leave the 44 acres of deeryard on their property in a natural, undeveloped state as a condition of development of any other area of Petitioners' property. App. A28. Accordingly, it would appear, under the reasoning of this Court's decision in *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842 (1992), that Respondents have,

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[11] Petitioners allege in their complaint that they have been deprived of their reasonable investment-backed expectations in the entire 88 acre property as a result of Respondents' denial of their permit application. App. F20-F22.

under color of State law, taken all beneficial use of 44 acres of Petitioners' property.

The Court's pronouncement in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated", *Penn Central*, 438 U.S. 104, 130 (1978) must be reexamined in light of this Courts' decision in *Lucas*. There is a compelling need for this Court to finally determine the extent to which a taking has occurred when government action deprives a property owner of all value of a portion of their property.

In *Lucas*, the Court noted that the issue of whether a taking has occurred with respect to the parcel as a whole or the burdened portion of the parcel was unsettled, and that it was unclear "whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 60 U.S.L.W. at 4845 n.7. The Court recognized that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Id.*

The facts in *Lucas* did not afford the Court an opportunity to address the inconsistencies resulting from the Court's formulation in *Penn Central*; in *Lucas*, the development restriction which required that the land be left in its natural state applied to the entire property. *Id.* at 4843. In this case, however, Respondents would prohibit the

development of any portion of the Southview Property unless the 44 acre deeryard is retained substantially in its natural state. Under the Court's decision in *Lucas*, Respondents have accomplished a complete taking of 44 acres of Petitioners' property. It remains to be answered by this Court whether it will recognize that a taking occurred when fully half of Petitioners' property has been left "without economically beneficial or productive options for its use". *Lucas*, 60 U.S.L.W. at 4846.

The preservation of deeryards under Act 250, through which Respondents have sought to deprive Petitioners of the use and benefit of 44 acres of their property, became law in 1970, and in no sense does Respondents' exercise of their authority under Act 250 "inhere in the title itself", or "in the restrictions that background principles of the State's law of property and nuisance already place upon the land ownership." *Id.* at 4849. Nor is there any suggestion that the exclusion of deer from private property has ever been considered a public or private nuisance under Vermont law. In fact, other provisions of Vermont law allow such exclusion. App. F19.

The decision of the Court of Appeals, if allowed to stand, will encourage government agencies to view the preservation of wildlife habitat on private land through regulation as an attractive, practical and inexpensive alternative to "the use of the many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitude on private scenic lands preventing development uses, or to acquire such lands altogether." *Lucas*, 60 U.S.L.W. at 4846. In granting this Petition, the Court will be afforded an opportunity to resolve one of the most confusing, contentious and unsettled questions in takings jurisprudence.

III. NEITHER ACT 250 NOR ANY OTHER PROVISION OF VERMONT LAW PROVIDES A REASONABLE, CERTAIN OR ADEQUATE MEANS OF OBTAINING COMPENSATION FOR THE TAKING OF PETITIONERS' PROPERTY

A. In *Williamson v. Hamilton Bank* And *Presault v. Interstate Commerce Comm'n*, This Court Required Government, In The Exercise Of Its Power To Take Property, To Provide A Reasonable, Certain And Adequate Compensation Remedy; That Requirement Is Not Satisfied If The Procedure To Obtain Compensation Is "Unsure And Undeveloped", Or If No Such Remedy Exists Under Law.

This case raises an important issue of national consequence which, in light of the decisions of several Courts of Appeal since this Court's decision *Williamson* is clearly in need of clarification.[12]

While it is acknowledged that, under appropriate circumstances, government has the right to adopt and implement land use regulations which, while providing a public benefit, may result in the taking of a fundamental right or in the deprivation of all beneficial use of the owner's property, the power to regulate must be accompa-

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[12] *See, e.g., Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986). Courts of Appeal have cited *Williamson* as the source of the mantra "state court procedure will be deemed adequate even when that procedure remains unsure and undeveloped". App. A30. *Williamson*, however, stands for an entirely different proposition. In *Williamson*, the Court established that, to satisfy the Due Process and Just Compensation provisions of the Fifth Amendment, the procedure to be provided for compensation in the event of a taking must be "reasonable, certain and adequate". *Williamson*, 473 U.S. at 194.

nied by an equal and concomitant duty to provide a reasonable, certain and adequate means of obtaining compensation if a taking occurs. Petitioners should not be left to wander through the wilderness of constitutional jurisprudence to find a remedy for Respondents' taking of Petitioners' property and fundamental rights. It is submitted by Petitioners that the constitutional requirement of "Just Compensation" refers not only to the amount of compensation, but also to the process of obtaining compensation. When the government has not provided an adequate process for obtaining compensation, that fact alone should lead to the conclusion that the property owner has been denied both Due Process and Just Compensation.

In its decision below, the District Court relied upon *Williamson* in support of the conclusion that "Southview has never obtained a decision from the Vermont state courts that compensation is disfavored or unavailable." App. B8. Judge Billings attaches no significance of the specific finding of this Court in *Williamson* that "[u]nder Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. TENN. CODE ANN. § 29-16-123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain." *Williamson*, 473 U.S. at 196 (emphasis added). Likewise, this Court was not satisfied that a "reasonable, certain and adequate remedy" for compensation existed in *Presault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), until it found a statutory compensation remedy in the Tucker Act. *Presault*, 494 U.S. at 14. The assumptions by the Court of Appeals in this case, and the Ninth Circuit in *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988), that this Court intended that any means of compensation, no matter how undeveloped or uncertain,

would suffice, is contrary to the Court's mandate that "a reasonable, certain and adequate provision for obtaining compensation [must] exist at the time of the taking." *Williamson*, 473 U.S. at 194 (citations omitted).[13] Neither Respondents nor the Court of Appeals found it necessary to explain why this Court found specific statutory post-deprivation remedies in *Williamson* and *Presault* necessary to satisfy the constitutional requirement of a reasonable, certain and adequate compensation remedy, but chose instead to follow the "see if you can find it" illogic of *Austin*. *Compare Presault*, 494 U.S. at 12-17 *with Austin*, 840 F.2d at 860-81.

Petitioners submit that it is significant that, in instances where this Court has sought a "reasonable, certain and adequate remedy" for a taking of property, its cases have identified a statutory remedy as satisfying the Due Process and Just Compensation provisions of the Fifth Amendment. As the Court observed in *Williamson*, "predeprivation process is of obvious value in reaching an accurate decision, . . . [and] may serve the purpose of making an individual feel that the government has dealt with him fairly". *Williamson*, 473 U.S. at 195 n.14 (citations omitted). The issue here is not whether the process should be pre- or post-deprivation, but whether there exists any process under Vermont law which deals fairly with Petitioners. As the Court of Appeals recognized, there is no compensation

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[13] In each of the cases cited by this Court in *Williamson* in which it found a "reasonable, certain and adequate provision for obtaining compensation", the Court found a statutory remedy. See *Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (Tucker Act found to provide a "reasonable, certain and adequate provision for obtaining compensation"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("generally an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act"); *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) ("Government has an implied promise to pay that compensation and has afforded a remedy for its recovery in a suit in the Court of Claims"); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (complainant can recover compensation under the Tucker Act).

procedure available under the Vermont Statutes for regulatory takings. App. A32.

This Court should make clear that, as a matter of responsible governance, if a state law or regulation is adopted or applied in a manner which results in the taking of property, the state legislature has a duty to provide a remedy which is as certain and available to the property owner as the law or regulation which effected the taking. The failure of the Vermont legislature to provide an "adequate postdeprivation remedy for the property loss", violates both the right to Due Process and the right to Just Compensation guaranteed to Petitioners under the Fifth and Fourteenth Amendments to the United States Constitution.

The notion embraced by the Courts of Appeal for the Second and Ninth Circuits, that, no matter how unreasonable, uncertain or inadequate (or unavailable) state compensation remedies are, the Constitution itself satisfies the requirements of Due Process and Just Compensation appears inconsistent with the decision of this Court in *Williamson*. Because of the importance of this issue to regulatory takings throughout the country, and because of the apparent, and Petitioners believe unwarranted, expansion of this Court's rulings in *Williamson* and *Presault* by the Courts of Appeal, Petitioners believe that this Court should grant *certiorari* and rule that there must be a statutory compensation method provided by the State to assure an adequate process to receive just compensation.

B. The Vermont Supreme Court Has Determined That, Under The Vermont Constitution, In The Absence Of A Specific Statutory Provision For Compensation, The Remedy For A Regulatory Taking Is Not Compensation, But The Invalidation Of The Regulation Which Effects The Taking

In its decision below, the Court of Appeals recognized, as Petitioners have alleged, that the State of Vermont has not "legislated a cause of action for inverse condemnation". App. A31. Judge Oakes concludes, however, that "the Vermont Supreme Court recognizes a cause of action for a taking generally, even if it has yet to decide whether recovery can be had for a regulatory taking." App. A32. In reaching this conclusion, Judge Oakes discusses at length Vermont cases which, while dealing with the issue of compensation for damage to property arising out of random and unauthorized acts of government employees, are irrelevant to the issue of the regulatory taking which is central to this case. Curiously, Judge Oakes makes no mention of the cases decided by the Vermont Supreme Court which expressly provided that, in the absence of a specific statutory provision for compensation, the remedy for a regulatory taking is to strike down the regulation. *Foster v. Stafford Nat'l Bank*, 57 Vt. 128, 133, 5 A. 890, 895 (1894). In short, none of the cases relied upon by the Court of Appeals in support of its contention that "Vermont provided a route whereby [Petitioners] may seek compensation in its courts" are applicable to regulatory takings. App. A31.

In *Foster*, the Vermont Supreme Court dealt specifically with regulatory takings and established the constitutional requirement for statutory compensation provisions in cases where the taking of property arose out of a legislative act. *Foster*, 57 Vt. at 133, 5 A. at 895. Although both Petitioners and Respondents cited and

discussed *Foster*, there is no mention of *Foster* in the Court of Appeals' decision. In *Foster*, the court stated clearly and unequivocally that:

> any legislative act authorizing . . . an appropriation . . . which does not provide for compensation, is plainly in conflict with the Constitution. The compensation must be made at the time of the taking, or some certain security must be given, or fund provided for its ultimate payment. A party whose property has thus been taken cannot be divested of it upon the security that an award or judgment may furnish him alone. In this case no compensation was made or tendered, and no adequate method was provided by which the damages could be ascertained, or security provided for their ultimate payment. . . . [T]he failure to make compensation or to give such security for its payment as the law requires, rendered the act unconstitutional.

Foster, 57 Vt. at 133-34, 5 A. at 895-96 (emphasis added, citations omitted).

The Vermont Supreme Court's decision in *Foster* establishes that, under Vermont law, in the absence of a specific statutory compensation remedy, a legislative act which effects a taking is unconstitutional. *Foster* has been cited in numerous cases, has never been overruled or modified, and stands to this day as controlling law in Vermont. There is no compensation remedy available to Petitioners under Vermont law. Furthermore, contrary to the conclusions of the Court of Appeals, the Vermont Supreme Court has neither provided a compensation remedy for regulatory takings, nor has it suggested that the remedy provided in *Foster* is not the sole and exclusive remedy for uncompensated regulatory takings. Since Vermont law

provides no compensation remedy for a regulatory taking, and since Respondents, acting under color of State law, have taken Petitioners' property, invalidation of Respondents' application of State law, and not compensation, is the available State remedy. It would be both unnecessary and futile for Petitioners to seek compensation in State court.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the cause remanded for adequate consideration below.

DATED: January 26, 1993

Respectfully submitted,

A. JAY KENLAN, ESQ.
Counsel of Record
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.
71 Allen Street
Rutland, VT 05702-0578
(802) 773-3300

Attorneys for Petitioners
Southview Associates, Ltd.,
Southview at Stratton Partners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1640—August Term, 1991

(Argued June 4, 1992 Decided October 30, 1992)

Docket No. 92-7209

SOUTHVIEW ASSOCIATES, LTD., and
SOUTHVIEW AT STRATTON PARTNERS,

Plaintiffs-Appellants,

—v.—

FERDINAND BONGARTZ, Member, Vermont Environmental Board; LIXI FORTNA, Member, Vermont Environmental Board; ARTHUR GIBB, Member, Vermont Environmental Board; SAMUEL LLOYD, Member, Vermont Environmental Board; WILLIAM MARTINEZ, Member, Vermont Environmental Board; CHARLES STORROW, Member, Vermont Environmental Board; STEVE WRIGHT, Member, Vermont Environmental Board; and ELIZABETH COURTNEY, Chairman, Vermont Environmental Board,

Defendants-Appellees.

Before:

OAKES, *Chief Judge*,* MCLAUGHLIN, *Circuit Judge*, and LAY, *Senior Circuit Judge*.**

Appeal from a judgment of the United States District Court for the District of Vermont, Franklin S. Billings, Jr., *Judge*, dismissing appellants' claims for relief under the Fifth and Fourteenth Amendments. Dismissal of appellants' taking claim based on alleged physical occupation of their land is affirmed on the merits. Dismissal of appellants' regulatory taking and substantive due process claims on the basis that they are not ripe is affirmed. Judge Oakes, however, states his views on the merits of those claims, but only for himself.

Affirmed.

A. JAY KENLAN (Abell, Kenlan, Schweibert & Hall, of counsel), *for Plaintiffs-Appellants*.

JEFFREY L. AMESTOY, Attorney General of the State of Vermont (John H. Hasen, Ronald L. Shems, Assistant Attorneys General, of counsel), *for Defendants-Appellees*.

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* After argument but before decision, Chief Judge Oakes became a Senior Circuit Judge.

** Honorable Donald P. Lay, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OAKES, *Chief Judge*:

This appeal requires us to decide whether the denial, pursuant to Vermont's land use statute, Act 250, 10 V.S.A. § 6001 *et seq.* (1984 & Supp. 1991) ("Act 250"), of a permit in respect to a vacation home development in the Green Mountains, gives rise to valid claims for relief under the Fifth and Fourteenth Amendments. Appellants Southview Associates, Ltd. and Southview at Stratton Partners ("Southview") sued the Appellees, the individual members of the Vermont Environmental Board ("the Board"), under 42 U.S.C. § 1983 (1988). Southview claimed that the Board's denial of its application for an Act 250 development permit (1) deprived it of due process of law, (2) denied it equal protection of law, and (3) constituted a taking without just compensation. The United States District Court for the District of Vermont, Franklin S. Billings, Jr., *Judge*, granted the Board's motion to dismiss Southview's complaint, apparently pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and Southview now appeals. For the reasons set forth below, we affirm.

I.

A. *Act 250*

Act 250 has been a major feature of the Vermont legal landscape for over twenty years. Its enactment represented the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe. *See* Governor's Commission on Environmental Control, *Reports to Governor* 2 (January 1970; May 1970). A brief discussion of the backdrop to the statute's enactment underscores its purpose.

Beginning in the mid-1960s, Vermont experienced a massive increase in second-home construction and other recrea-

tional development, particularly in the southern portion of the state and around ski areas. Robert K. Reis, *Vermont's Act 250: Reflections on the First Decade and Recommendations for the Second* 9 (1980); David G. Heeter, *Almost Getting it Together in Vermont, in Environmental and Land Controls Legislation* 323, 326 (David R. Mandelker ed. 1976); Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control* 54 (1971) (prepared for the Executive Office of the President, Council on Environmental Quality); Erickson, *The Vermont Environmental Protection Act of 1970, in Environmental Protection* 678, 679 (Louis L. Jaffe & Laurence H. Tribe, eds. 1971). These developments shifted economic activity away from agriculture and forestry—the traditional mainstays of the region. Erickson, *supra*, at 679. The Town of Dover, located in Southern Vermont, provides an example. As one writer explained, in Dover, in 1969, developers were completing, building or planning 19 vacation home subdivisions. According to a regional planner, if all the planned lots had been improved and occupied, the town's population would have increased from 370 to 16,000 within a few years. *Id.*

This spate of development was fueled by several factors, including the construction of interstate highways, the increased popularity of skiing and other outdoor activities, and what might be termed America's fascination with "the country life." *See* Reis, *supra*, at 9. Although the development yielded considerable tax revenue and increased property values, at times it threatened to destroy the very base of its existence: Vermont's relatively unspoiled environment. Poorly planned vacation home subdivisions in mountainous areas—typified by steep slopes and thin soil cover—caused soil erosion, water pollution from sewage systems, and a decline in the aesthetic quality of the land. Erickson, *supra*, at 680; Bosselman & Callies, *supra*, at 54-55; Heeter, *supra*, at 327. Public concern over the side-effects of this new and rapid

growth reached the high water mark when, in the summer of 1968, the International Paper Company proposed to construct a huge recreational and vacation home development on 20,000 acres of wilderness in the towns of Stratton and Winhall. Governor's Commission on Environmental Control, *supra*, at 3; Bosselman & Callies, *supra*, at 54; Heeter, *supra*, at 328.

In May of 1969, then Governor Dean C. Davis responded by creating the Governor's Commission on Environmental Control. Governor Davis charged the Commission with determining how economic growth could be attained without environmental destruction. Heeter, *supra*, at 329 (quoting opening remarks by Governor Deane C. Davis, *Proceedings of the Governor's Conference on Natural Resources* 1 (May 14, 1969)). The Commission's recommendations included the enactment of a land use law that would require large developments, including subdivisions, to undergo administrative review prior to construction. Governor's Commission on Environmental Control, *supra*, at 3-4. This proposal formed the basis of Act 250, enacted by the Legislature in 1970.

Not all development projects are subject to Act 250 review. Essentially, an Act 250 permit is required if a person wishes to construct (1) improvements on a parcel or parcels involving more than ten acres located within a radius of five miles; (2) housing projects with 10 or more units located on land owned or controlled by that person within a radius of 5 miles; (3) a subdivision partitioned for resale into ten or more lots within a radius of 5 miles; and (4) improvements above the elevation of 2500 feet. No permit is necessary for construction required for farming, logging or forestry purposes below the elevation of 2500 feet. 10 V.S.A. §§ 6001, 6081(a) (1984 & Supp. 1991).

A person whose project is subject to Act 250 jurisdiction must file an application with the regional three-person district

commission. 10 V.S.A. §§ 6026, 6083 (1984 & Supp. 1991). The district commission evaluates the project according to ten criteria relating to: (1) water and air pollution that will result; (2) availability of water to meet the project's needs; (3) the project's burden on the existing water supply; (4) soil erosion that will result; (5) the project's effect on congestion and safety of transportation routes; (6) the burden the project will place on municipal and local government provision of educational and other services; (7) whether the project will have an undue adverse effect on "the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas"; and (8) whether the project conforms with various state, regional and local development plans. 10 V.S.A. § 6086 (1984 & Supp. 1991). If the district commission grants the application for a permit, it may attach conditions to it to assure compliance with the criteria for permit issuance. 10 V.S.A. § 6086(c) (1984).

A permit applicant may appeal the decision of the district commission to the nine-member Vermont Environmental Board. 10 V.S.A. §§ 6021(a), 6089(a) (1984 & Supp. 1991). The Board reviews challenged findings *de novo*. 10 V.S.A. § 6089(a) (Supp. 1991). The permit applicant may, in turn, appeal the Board's decision to the Supreme Court of Vermont, 10 V.S.A. § 6089(b) (Supp. 1991), which will uphold the Board's findings of fact "if supported by substantial evidence in the record as a whole." 10 V.S.A. § 6089(c) (Supp. 1991); *see In re Southview Associates*, 153 Vt. 171, 177, 569 A.2d 501, 504 (1989).

The Vermont Legislature accompanied the enactment of Act 250 with a statement of legislative intent, which provides, in part:

> [T]he unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont has resulted in usages of the lands and the environment

> which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont. . . . .
>
> . . . .
>
> . . . it is necessary to regulate and control the utilization and usages of lands and the environment to ensure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, [and] will promote the general welfare through orderly growth and development. . . ."

Findings and declaration of intent, 1969, No. 250 (Adj. Sess.), § 1, in 10 V.S.A. annotations following § 6001 (1984). Subsequently, in 1973, the legislature further clarified the purpose of the act by adopting a "Capability and Development Plan" to guide the implementation of Act 250. 1973 Capability and development plan; statement of intent and findings, 1973 No. 85, § 7, in 10 V.S.A. annotations following § 6042 (1984). *See* Norman Williams & Tammara Van Ryn-Lincoln, *The Aesthetic Criterion in Vermont's Environmental Law*, 3 Hofstra Prop. L.J. 89, 94-95 (1990). The plan states, in relevant part:

> (2) Utilization of Natural Resources
>
> [C]onservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes. . . are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby.
>
> . . . .
>
> (6) General Policies for Economic Development
>
> In order to achieve a strong economy . . . economic development should be pursued selectively so as to

provide maximum economic development with minimal environmental impact.

. . . .

(10) Recreational Resources

The use and development of land and waters should occur in such a way as not to significantly diminish the value and availability of outdoor recreational activities to the people of Vermont, including hunting . . . .

. . . .

(11) Special Areas

Lands that include or are adjacent to sites or areas of historical, cultural, scientific, architectural, or archeological value . . . should only be developed in a manner that will not significantly reduce that value of the site or area.

Thus, the Legislature intended Act 250 to protect Vermont's environmental resources with an eye towards maintaining, among other things, existing recreational uses of the land—such as hunting, for example—and preserving lands, when possible, that have special values to the public. In recognition of the importance of economic growth, however, the focus of the Act is not on barring development but on molding it to minimize its environmental impact. And in practice, one commentator has stated that "[t]he statute has . . . been administered not as a 'no-growth' law, but as a law designed to improve the quality of growth." Williams & Van Ryn-Lincoln, *supra*, at 94. We now turn to the dispute before us.

B. *Southview's Act 250 Experience*

As a threshold matter, for the purpose of this appeal we accept as true the factual allegations set forth in Southview's complaint. *See LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991).

In March 1982, twelve years after the enactment of Act 250, Southview entered into an agreement with Cersosimo Lumber Co., Inc. ("Cersosimo") to purchase a parcel of undeveloped land for $225,000. The parcel of land contains approximately 88 acres and is located in the towns of Stratton and Jamaica, Vermont, in an area that could be thought of as uplands, at an elevation of about 1600 to 1700 feet, near the world class ski area at Stratton Mountain. The transaction was consummated in June of 1982.

Southview purchased the land with the intent to build a 78-lot residential subdivision, replete with approximately 1,500 feet of roads and a community sewage collection, treatment and disposal system. Prior to executing the purchase and sale contract, Southview alleges that it evaluated the property to determine whether any of the land's characteristics would affect Southview's ability to obtain the necessary development permits, including the land use permit required under Act 250.

After entering into the $225,000 purchase and sale agreement, under which Southview apparently paid Cersosimo $10,000 down, Southview hired Southern Vermont Engineering Company ("Southern Vermont") to assist in a more rigorous evaluation of the development plan aimed at ensuring that the plan would comply with state and local land use laws, including the statutory criteria of Act 250. As part of its review of the project, Southern Vermont inspected deeryard maps—maps showing winter habitat for white-tailed deer—prepared by the Vermont Department of Fish and Wildlife ("Fish and Wildlife"). These maps did not indicate that any deeryards were located on the Southview property.[1]

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1 There is no suggestion, however, that the Board is estopped from denying the Act 250 permit by virtue of Fish and Wildlife's apparent error.

(footnote continued)

As the project progressed towards the filing of an Act 250 permit application, Southview learned that a deeryard did in fact exist on the property and that Fish and Wildlife would accordingly oppose Southview's permit application. Southview also reduced the planned number of units to 33 because of limited sewage disposal capacity—a common problem in the formerly glaciated mountainous regions of Vermont. Southview's revised plan called for clustering the 33 units into five areas amounting to 12 acres, developing a total of 23 acres, and leaving the remaining acreage to the homeowner's association, to hold in common and maintain in a managed forested condition.

Southview filed an application for an Act 250 permit with the District III Environmental Commission ("the Commission") in March 1985. Several hearings were held from April to December of 1985. In April 1986, the Commission denied the application under Criterion 8(A), 10 V.S.A. § 6086(a)(8)(A) (1984) ("Criterion 8(A)"), because of the adverse effect the project would have on the deeryard.

Criterion 8, which addresses the project's impact on the beauty of the area, historic sites and unique natural areas, provides in subdivision (A) that:

> A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil *necessary wildlife habitat* or any endangered species, and
>
> (i) the economic, social, cultural, recreational, or other benefit to the public from the development or

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Cf. Schweiker v. Hansen, 450 U.S. 785, 788-90 (1981) (holding that federal government employee's error did not justify estopping federal government from applying valid regulation).

> subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
>
> (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
>
> (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose. (Emphasis added.)

The key phrase "necessary wildlife habitat" is defined as "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods." 10 V.S.A. § 6001(12) (1984).

The Commission determined that the development would significantly imperil necessary wildlife habitat and that the resultant loss to the public would not be outweighed by the economic, social, cultural, recreational and other benefits to the public that the project would create. This conclusion was based on several findings of fact.

The Commission found, and all parties agreed, that the proposed development was situated within a 280 acre deeryard. As the Commission, and subsequently the Board, explained, a deeryard serves as winter habitat for white-tailed deer and plays a central role in the deer's ability to survive the winter—providing the necessary browse and other, more important, requirements for winter survival.

Deer endure harsh winter conditions in large part by drawing energy from fat reserves accumulated in late summer and

early fall. Browse provides only a secondary source of energy. The deer's capacity to conserve use of its energy reserves is the most critical factor in whether it will survive the winter. The Commission and the Board found that the shelter afforded by an ideal deeryard, like the one on the Southview property, enables deer to minimize the drain on their energy reserves. Protected concentrations of softwood cover provide the best shelter, by (1) blocking cold winds; (2) retaining solar heat and reducing nighttime heat radiation; (3) reducing snow depth (because snow remains on the boughs), thereby reducing the energy deer must use to move around within the deer yard; and (4) shielding deer from human and canine activity, which, if nearby, will cause the deer to stand or move and thereby expend energy. If human activity in close proximity to the deeryard reaches a certain level, deer will abandon the deeryard. *See also* Leonard Lee Rue, III, *The World of the White-tailed Deer* 91-118 (John K. Terres ed. 1962) (describing how deer survive the winter).

The Commission found that the entire deeryard in question, consisting of 280 acres, is the sole remaining, active deeryard within a 10.7 square mile area.[2] Forty-four acres of the Southview parcel represented one of two of the best "cover areas" within the entire deeryard. The proposed development, located in this 44-acre section of prime habitat, would destroy

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2 The availability of winter habitat has long limited the abundance and physical condition of deer in Vermont. Indeed, in the mid-1800s, when only about 30% of Vermont's land area was covered with forests, the deer population in Southern and Central Vermont was so decimated that a deer sighting could merit a newspaper story. Despite the existence of a constitutional right to hunt, fowl and fish, *see* Vt. Const. ch. II, § 67, deer hunting was barred from 1865 to 1896. This regulation, in conjunction with the reforestation of abandoned farmland, enabled the deer population to recover. Vermont Department of Fish and Wildlife, *Deer Management Plan for the State of Vermont, 1990-95* 2-3 (June 1990).

10 acres of concentrated softwood cover. The Commission found that Southview's habitat manipulation plan, which included seeding 13 acres to create softwood shelter, would not compensate for the lost softwood because it would take between twenty and forty years for the seedlings to reach the maturity necessary to afford the deer the required shelter.

Southview appealed to the Vermont Environmental Board, which denied the permit application in June 1987. The Board first concluded that, as applied to Southview, the "necessary wildlife habitat" language of Criterion 8(A) required it to determine whether the deeryard on the property was decisive to the deer that used it. In so finding, the Board rejected Southview's interpretation, which would have allowed for the destruction of deer habitat provided that some deer survive.

The Board, like the Commission, found that the Southview property was within the sole remaining deeryard in a 10.7 square mile watershed. Three hundred acres of deeryard had previously been destroyed in the Stratton area, and what has survived now contains only two primary areas of softwood cover. One of these areas—44 acres of critical softwood cover—is within the Southview parcel, and the proposed residential subdivision, the Board determined, would destroy 10 acres of this critical softwood, while secondary effects from people living in the proposed homes would imperil the remaining 34 acres. The impact on the habitat would result in a loss of deer.

The Board concluded that the proposed development would "destroy and significantly imperil necessary wildlife habitat." *See* 10 V.S.A. § 6086(a)(8)(A) (1984). The Board also held that:

> [T]he environmental and recreational loss to the public from the destruction and imperilment of the habitat is not

> outweighed by the economic, social, cultural, recreational, or other benefit to the public from the project.
>
> . . . .
>
> . . . the loss to the public from the destruction and imperilment of the deer habitat [that this project will cause] is significant. . . . The existence of the deer in this area provides an opportunity to the public to hunt and to observe deer and provides the more intangible benefit of knowing that the deer exist. The loss of the deer in this area would be significant to the public who benefit from their existence.

See 10 V.S.A. § 6086(a)(8)(A)(i) (1984).

The Board also found that the development would have far less impact on the deer if Southview situated it on other areas of its 88 5 acre property. In fact, Fish and Wildlife proposed alternative plans for development in other areas of the site. The Board noted that it did not believe that Southview had thoroughly investigated the possibility of less intensive development in other areas of property. The Board concluded that Southview had not "applied all feasible and reasonable means of preventing or lessening the destruction and imperilment of the deer habitat." *See* 10 V.S.A. § 6086(a)(8)(A)(ii) (1984).

Southview next appealed to the Vermont Supreme Court, which affirmed the Board's decision. *In re Southview Associates*, 153 Vt. 171, 179, 569 A.2d 501, 505 (1989). The Court upheld the Board's interpretation of the term "necessary wildlife habitat," as habitat decisive to the population that depends on it. *Id.* at 176, 569 A.2d at 503. Having exhausted the possibilities for appellate review of the Commission's denial of its sole permit application, Southview did not attempt to modify the location of the units or otherwise seek to revise its application. Instead, it brought this lawsuit in federal district court.

The district court dismissed Southview's claims, apparently pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The court held that Southview had not sufficiently pled either a substantive due process or an equal protection claim. Nor, it held, did Southview's allegations state a claim for a permanent physical occupation. Finally, the court dismissed Southview's claim of a regulatory taking because it was not ripe.

II.

We decide Southview's claims as follows. First, we address its claim that it has suffered a permanent physical occupation of its property. Second, we determine whether Southview's regulatory taking and substantive due process claims are ripe for review and hold that they are not. This ends the opinion for my colleagues. I proceed, however, to discuss the merits of Southview's substantive due process claim and whether the Board's actions have effected a regulatory taking, matters as to which I am stating only my own views.

We do agree that the district court's dismissal of Southview's action is a ruling of law which we review *de novo*. *See Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 885 (2d Cir.), *cert. denied*, 111 S. Ct. 141 (1990).

A. *Permanent Physical Occupation*

Southview first argues that the district court erred because it has alleged facts which, if proved, would establish that it has been compelled to submit to a physical occupation of its property. Southview contends that the Board caused this injury by denying its application for an Act 250 permit, and by prohibiting Southview from developing its property in any way that would exclude the deer from the deeryard. These actions allegedly deprive Southview of its right to exclude the deer from its property, which amounts to a physical occupation of the property. Furthermore, Southview contends that

this occupation is permanent because the Board has permanently designated portions of its property as a deeryard.

If a government has committed or authorized a permanent physical occupation of property, "the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *see also Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). Indeed, as Southview correctly points out, if government action constitutes a permanent physical occupation of property, there is "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). This type of taking, requiring courts to apply a *per se* rule, has been termed a "physical taking," *see Yee*, 112 S. Ct. at 1527, and stands in contrast to the fact-intensive inquiry accompanying a judicial determination of whether a "regulatory taking" has occurred.[3] *Id.* at 1526.

Loretto helps define what constitutes a physical taking. In *Loretto*, the Court reviewed a New York law that required a landlord to permit a cable company to install cable equipment on his building. *Loretto*, 458 U.S. at 421. The Court held that the permanent cable installation on the landlord's building was a permanent appropriation of a portion of the landlord's property and, therefore, constituted a physical taking, even though it displaced only approximately one-half of a cubic foot of property. *Loretto*, 458 U.S. at 438 & n.16. The *Loretto*

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3 Essentially, a regulatory taking—also known as inverse condemnation—occurs when the purpose of government regulation and its economic effect on the property owner render the regulation substantively equivalent to an eminent domain proceeding and, therefore, require the government to pay compensation to the property owner. *See Yee*, 112 S. Ct. at 1526; *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980).

Court explained that a permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. *Id.* at 435. First, the government (or government authorized) action must deprive the owner of both his right to possess the occupied area and his right to exclude the occupier from possession and use of it. *Id.* Second, the government action must "forever den[y] the owner any power to control the use of the property," such that he "can make no nonpossessory use" of it. *Id.* at 436. Third, the government action generally leaves the owner with only "the bare legal right to dispose of the occupied space," because the occupier ordinarily renders that right worthless, and "the purchaser will also be unable to make any use of the property." *Id.* The Court added that *absolute* exclusivity of the occupation, and *absolute* deprivation of the owner's right to use and exclude others from the property, were hallmarks of a physical taking. *Id.* at 435 n.12. In setting forth this test, the Court also noted that the injury was "special" because the occupation is by a stranger. *Id.* at 436. In conclusion, the *Loretto* Court emphasized that its determination that the facts before it constituted a permanent physical occupation was "very narrow," and that states retained "broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441.

Two subsequent cases, *Yee* and *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), confirm the narrow scope of so-called physical takings. In *Florida Power Corp.*, the Court addressed a challenge to the Pole Attachments Act, 47 U.S.C. § 224 (1988), which authorizes the FCC to regulate certain rates utility companies can charge cable television operators who lease utility company poles to carry their television cables. *Id.* at 247. Despite a substantial reduction in rent effected by the FCC regulation, the Court held that no physical taking had occurred because the utility had *invited* the cable

company to lease the poles; no government compulsion existed. *Id.* at 252-53. As the Court explained, "required acquiescence is at the heart of the concept of occupation," *id.* at 252, but such required acquiescence was notably absent in the facts before the Court.

Government compulsion was also absent in *Yee*. The Court ruled that an Escondido, California municipal rent control ordinance applicable to mobile home park owners did "not authorize an unwanted physical occupation." *Yee*, 112 S. Ct. at 1531. The petitioners, mobile home park owners, claimed that the rent control ordinance rendered the mobile home owners perpetual tenants. They also claimed that the ordinance, in mandating below-market rates, transferred from the park owners, to the existing tenants, an increase in the value of their mobile homes—a gain that the tenants could realize when they sold their mobile homes to new purchasers. In effect, the park owners contended, the ordinance transferred to the tenants "a right of physical occupation of the park owner's land." *Id.* at 1528. The Court determined, however, that no physical taking had occurred because the government had not authorized a mandatory physical occupation of the park owner's property. *Id.* The Court explained that "the government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* No government compulsion was present in *Yee* because the "[p]etitioners voluntarily rented their land to mobile home owners," and moreover they were not compelled to continue to do so. *Id.* The Court concluded that, even if the ordinance operated to transfer wealth from the park owners to the mobile home owners, it represented a regulation on the use of the petitioners' property, rather than a *per se* taking by virtue of a permanent physical occupation. *Id.* at 1530-31.

Application of the principles set forth in *Loretto*, *Florida Power Corp.*, and *Yee* demonstrate that Southview has not

suffered a physical taking. Initially, we note that Southview has satisfied the permanency aspect of a physical taking for the purposes of a Fed. R. Civ. P. Rule 12(b)(6) motion, because it alleges that the Board will continue, permanently, to deny Southview an Act 250 permit that would impair the deeryard. However, Southview has failed adequately to allege the remaining elements of a physical taking.

Consider the three components of property rights discussed in *Loretto*. *See Loretto*, 458 U.S. at 435-36. First, Southview has not lost the right to possess the allegedly occupied land that forms part of the deeryard. Southview retains the right to exclude any persons from the land, perhaps by posting "No Trespassing" signs. Southview can even exclude the deer, perhaps with a fence, provided it does so under circumstances that do not require it to obtain an Act 250 permit—such as by the planting of an orchard. Second, Southview retains substantial power to control the use of the property. For example, it could construct improvements involving up to 10 acres of it for any purpose—construction of an inn may be possible—because Act 250 does not apply to development involving less than 10 acres. 10 V.S.A § 6001(3) (Supp. 1991). Moreover, according to the terms of Act 250, Southview could engage in "construction for farming, logging or forestry purposes," *id.*, on the entire 44 acres of critical softwood in the deeryard without the need to seek a permit from the Commission.[4] In addition, Southview's owners can, to the exclusion of others, walk, camp, cross-country ski, observe wildlife, even hunt deer on this land—irrespective of whether these activities cause the deer to abandon the deeryard. Third, because all of these uses, and many more, are available to any

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4 This may seem inconsistent with the rest of the Act, especially where deeryards are involved. But courts cannot expect legislatures to be omniscient or not subject to compromise.

owner of the deeryard land, Southview's right to sell the land is by no means worthless. The Board's denial of Southview's one application for an Act 250 permit can hardly be said to have "empt[ied] . . . of any value" Southview's right to dispose of the 44 acres of deeryard. *See Loretto*, 458 U.S. at 436.

Put differently, no absolute, exclusive physical occupation exists. *See id.* at 435 n.12. To the extent the Board has allowed the deer to "invade" Southview's land, this "invasion" is relatively minor, consisting of an occasional, seasonal, and limited habitation by no more than 20 deer.[5] Minor physical intrusions are not physical takings. *See id.* at 426. Indeed, the deer activity displaces only a few sticks in the bundle of rights that constitute ownership. *See* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 589 (1981). In any event, no absolute dispossession of Southview's property rights has occurred. *See Loretto*, 458 U.S. at 426 n.12. Under *Loretto*, there has been no physical taking.

Application of the government compulsion requirement—central to the results in *Florida Power Corp.* and *Yee*—yields a similar result. In *Yee*, there was no government compulsion because the mobile home park owners voluntarily rented their land to mobile home owners, and they were not compelled to continue to do so. *Yee*, 112 S. Ct. at 1528. The Court considered the park owners' submission to the rent control ordinance, as well as their submission to the resultant alleged physical invasion, to have been voluntary even though the owners were apparently engaged in this business before the ordinance was enacted.

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5 And, unlike the physical occupation at issue in *Loretto*, deemed especially offensive because the occupier was a "*stranger*," *Loretto*, 458 U.S. at 435, here the deer are not strangers to their winter habitat—the deeryard.

Here, even if the Board's action were a permanent physical occupation, there was no government compulsion. Just as the mobile home park owners voluntarily rented their land in *Yee* and, in so doing, engaged in activity that subjected them to the effects of the rent control ordinance, *id.*, Southview voluntarily proposed to construct a residential subdivision development project, and, in so doing, engaged in activity that subjected it to the Act 250 review process. Moreover, at the time Southview purchased the land it knew that the project would be subjected to Act 250 scrutiny. Denial of the Act 250 permit—foreclosing one configuration of a development plan—represents a regulation of the use of Southview's property, rather than a *per se* physical taking. *See id.*, 112 S. Ct. at 1528-31; *see also Kaufman v. City of New York*, 717 F. Supp. 84, 94-95 (S.D.N.Y.), *aff'd*, 891 F.2d 446 (2d Cir. 1989), *cert. denied*, 495 U.S. 957 (1990). Accordingly, Southview's physical taking claim was properly dismissed.[6]

B. *Ripeness*

We next must determine whether Southview's substantive due process and regulatory takings claims are ripe for review. As the district court explained, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), sets forth a two-pronged test for assessing the ripeness of

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6 Although Southview maintains that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), provides critical support for its physical taking claim, *Nollan* is largely irrelevant to this claim because it involved a regulatory taking, rather than a physical taking. *See id.* at 834, 838-42; *see also Yee*, 112 S. Ct. at 1529-31. The *Nollan* Court did state in dictum that, had California required the property owners to grant the public an easement across their beachfront property, such government action would have constituted a physical taking. *Nollan*, 483 U.S. at 831-32. Yet even this dictum is wholly inapplicable to Southview's physical taking claim because, as discussed above, the Board has not *required* Southview to submit to a physical invasion by the deer.

takings-type claims. The first prong requires the government entity charged with enforcing the regulations at issue to have rendered a "final decision." *Id.* at 186. The second prong requires the plaintiff to have sought compensation if the state provides a "reasonable, certain and adequate provision for obtaining compensation." *Id.* at 194 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)).

1) Applicability of Ripeness Inquiry

Here we examine whether each of the two prongs of the *Williamson* ripeness inquiry apply to Southview's (1) taking claim; (2) substantive due process claim premised on the theory that regulation has gone "too far"; and (3) substantive due process claim premised on arbitrary and capricious government conduct.

Southview first argues that because it has properly alleged a physical taking, and the *Williamson* ripeness test does not apply to physical takings, *see Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281-82 n.28 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), the district court erred in dismissing its claim under *Williamson*. We have concluded, however, that Southview has failed adequately to allege a physical taking claim, and instead the denial of the permit amounts to a regulation on Southview's use of its property. Thus, Southview's takings argument represents a regulatory taking claim to which both prongs of the *Williamson* ripeness test are fully applicable.

Southview also argues that its substantive due process claim is immune from ripeness scrutiny. Before addressing the ripeness of this claim, we note that Southview is apparently advancing two distinct substantive due process theories. Under the first, it is well established that a government land use decision may give rise to a substantive due process violation if the decisionmaking process is arbitrary and capricious.

Under a second, less developed approach, one to which the Supreme Court has yet to give its imprimatur, "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause." *Williamson*, 473 U.S. at 197; *see also* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1097-99 (1980) (discussing *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed for want of juris. and cert. denied*, 429 U.S. 990 (1976)). We next examine each substantive due process theory to determine whether *Williamson* applies.

Contrary to Southview's assertion, a substantive due process claim premised on the theory that a regulation has gone too far is subject to both prongs of the *Williamson* ripeness test. Such a claim remains premature "until a final decision is made as to how the regulations will be applied" to a landowner's property. *Williamson*, 473 U.S. at 200; *see Eide v. Sarasota County*, 895 F.2d 1326, 1329 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991). Without such a final decision, a court cannot determine adequately the economic loss—a central factor in the inquiry—occasioned by the application of the regulatory restrictions. Unless a final decision has been rendered, it remains unclear just how far the regulation goes. *Williamson*, 473 U.S. at 199-200; *Eide*, 895 F.2d at 1329; *see Lucas*, 112 S. Ct. at 2925-26 (Statement of Souter, J.). The compensation component of the *Williamson* test is also applicable to a substantive due process claim predicated on the notion that the regulation has gone too far. *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 515-16 (1st Cir. 1987). If the state provides an acceptable procedure for obtaining com-

pensation, the state's regulatory action will generally not exceed its police powers.[7] *See id.* at 516.

Southview's substantive due process claim premised on arbitrary and capricious government conduct, however, is subject to only the final decision prong of the *Williamson* ripeness test. Unless a court has a final decision before it, it cannot determine whether a claimant was deprived of property and whether the government conduct was arbitrary or capricious. *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989); *see Herrington v. County of Sonoma*, 834 F.2d 1488, 1494-95 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989); *see also Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) ("In evaluating the ripeness of due process or equal protection claims arising out of the application of land use regulations, we employ the same final decision requirement that applies to regulatory taking claims."); *but see Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 n.11 (11th Cir. 1989) (stating, in dicta, that it is "not at all clear" that final decision requirement should apply to substantive due process claim premised on arbitrary zoning decision).

However, the second *Williamson* requirement, that the plaintiff seek an available state remedy, is not applicable to this type of substantive due process claim. *Sinaloa Lake*

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7 We digress to make a point relevant to the merits of Southview's substantive due process claim. Under the facts of this case, we discern no difference between the test for a determination of the validity of Southview's regulatory taking claim, and that for Southview's substantive due process claim under the theory that the Board has gone "too far." By its terms, a due process violation under this theory—a theory the Supreme Court flirted with, but did not approve, in *Williamson*—can only occur if the regulation has the same effect as a taking by eminent domain. Accordingly, we view this test as co-extensive with the inquiry we face under a claim for a regulatory taking. *See also* Stoebuck, *supra*, at 1098..

Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404, 1407 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). The requirement that a plaintiff seek compensation in state court is, as we discuss below, derived from the Takings Clause, *see id.* at 1404, to which a substantive due process claim, premised on arbitrary and capricious government conduct, is largely unrelated.

In sum, both prongs of the *Williamson* test apply to Southview's taking claim, as well as to both substantive due process theories, except the compensation requirement is inapplicable to Southview's substantive due process claim premised on arbitrary and capricious government conduct.

2) Final Decision Requirement

Southview next argues that the Board's application of Criterion 8(A) of Act 250 constituted a final decision under *Williamson*, because given the Vermont Supreme Court's affirmance of the Board's decision, there exists no other avenue for Southview to contest the denial of an Act 250 permit for its proposed development. Southview also contends that once the Department determined that its property was part of a deeryard, the Board decided to bar Southview from using its property in a way that would exclude deer from it. Despite these allegations, Southview cannot show that it has obtained a final decision.

In *Williamson*, a developer claimed that the county zoning commission's denial of approval of his plans for a residential subdivision constituted a regulatory taking. *Williamson*, 473 F.2d at 182. The developer could have sought "variances that would have allowed it to develop the property according to its proposed plat." *Id.* at 188. Based largely on the developer's failure to pursue such variances, the Court found that the developer had not yet obtained a final, reviewable decision—the type of decision that would "conclusively determine whether

[the developer] will be denied all reasonable beneficial use of its property." *Id.* at 194. The Court explained the rationale for the final decision requirement as follows:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. at 190-91 (citations omitted).

In addition to *Williamson*, several other Supreme Court decisions help define the contours of a "final decision." As the *Williamson* Court explained, in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the plaintiff's taking claim was unripe because, although the city commission had rejected one development plan, "the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Williamson*, 473 U.S. at 187 (citing *Penn Central*, 438 U.S. at 136-37). And in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-52 (1986), the county Board of Supervisors affirmed the county Planning Commission's rejection of a landowner's subdivision plan. The Court held that, based on the pleadings which revealed that only one subdivision proposal had been submitted and only one had been denied approval, the landowner had failed to satisfy the final decision requirement because

the possibility existed that "some development will be permitted." *Id.* at 352.

We do not believe that the Supreme Court's recent holding in *Lucas* undermines the authority of either *Williamson*, *Penn Central*, or *MacDonald*, nor has it any bearing on whether Southview has obtained a final decision.

In *Lucas*, the Court addressed a regulatory taking claim asserted by Lucas against the South Carolina Coastal Council. The Court found Lucas' temporary taking claim ripe despite his failure to use a discretionary "special permit" procedure which may have enabled him to develop his land. The temporary taking claim covered a two-year period. *Lucas*, 112 S. Ct. at 2891-92.

The "special permit" procedure, however, did not exist when the taking occurred, nor did it exist when the state trial court found a regulatory taking for which compensation was due. The procedure was implemented only after appeal was taken to the South Carolina Supreme Court. That court found that no taking had occurred and reversed the trial court's ruling on the merits. The Supreme Court of the United States apparently relied on three factors in finding Lucas' claim ripe: (1) the "special permit" procedure was unavailable to Lucas during the period of his alleged temporary taking; 2) the South Carolina Coastal Council stipulated that, during this period, any other efforts to obtain approval for development would have been futile; and 3) the South Carolina Supreme Court's decision rejecting Lucas' taking claim on the merits barred him from seeking relief, in state court, for the temporary taking. *Id.* at 2890-92 & n.3.

Given these factors—particularly the fact that the "special permit" procedure was nonexistent during the relevant period as well as the futility exception to the final decision requirement, *see, e.g.*, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449,

1454, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)—the Court's determination that Lucas' temporary taking claim was ripe is consistent with *Williamson*, *Penn Central*, and *McDonald*. Moreover, none of the three factors relied on by the Court parallel the facts before us.

Accordingly, we apply *Williamson*, *Penn Central*, and *McDonald* to the facts at hand and hold that Southview has not yet obtained a final decision. Like the plaintiffs in *Penn Central* and *McDonald*, Southview has submitted, and the Board has denied, only one application for an Act 250 permit. The Board's rejection of Southview's 33-unit subdivision proposal in no way precludes Southview from submitting another proposal, and it is "not clear whether the [Board will] deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Williamson*, 473 U.S. at 187 (citing *Penn Central*, 438 U.S. at 136-37).

Although Southview argues that submission of another application would be futile on account of the Department's designation of a deeryard on the property, this argument is fatally undercut by the decision of the Board. We can infer from the Board's decision that it would be receptive to a subdivision proposal that placed lots in a different segment of the 88.5 acre property so as to minimize impact on the critical areas of the deeryard. The Board found that "[t]he development would have far less impact on the deer if it were located on other areas of the property." The Board also concluded that Southview had not undertaken all feasible and reasonable means of reducing the development's effect on the deeryard, and it was "not persuaded that the Applicant has thoroughly investigated the possibility of less intensive development in other areas of the site." As in *Williamson*, where it "appear[ed] that variances could have been granted" to resolve the majority of the Planning Commission's objections

to the subdivision plan, *Williamson*, 473 U.S. at 188, here it also appears that Southview can obtain a permit for a subdivision situated on another part of its property. Therefore, it is likely that "some development will be permitted," *McDonald*, 477 U.S. at 352, even if Southview proposes development that requires further Act 250 review. Although the Board has applied Act 250 to the one particular subdivision proposal in question, it has yet to provide "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson*, 473 U.S. at 191. For these reasons, Southview's taking and substantive due process claims remain unripe.[8]

3) State Court Compensation Requirement

Southview next argues that the district court erred in holding that it failed to meet the compensation prong of the *Williamson* test. As the district court stated, *Williamson* requires an owner to seek compensation from the state, prior to asserting a regulatory taking claim, if the state has a "reasonable, certain and adequate provision for obtaining compensation." *Williamson*, 473 U.S. at 194 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)). This requirement stems from the Fifth Amendment, which "does not proscribe the taking of property, it proscribes taking without just compensation." *Id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981)). Thus, a landowner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain

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8 Although a taking claim will not be ripe without a final decision, "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *McDonald*, 477 U.S. at 350 n.7 (citing *Williamson*, 473 U.S. at 205-06 (Stevens, J. concurring)).

just compensation through the procedures provided by the State." *Id.* at 195.

The *Williamson* Court found that Tennessee state courts had interpreted state statutory law to allow recovery when restrictive development regulations give rise to a taking. *Id.* at 196. The Court then held that because the claimant had not shown the Tennessee procedure to be "unavailable or inadequate . . . until it has utilized that procedure, its taking claim is premature." *Id.* at 197.

Subsequent decisions establish that a state compensation procedure will be deemed available and adequate within the meaning of *Williamson* even when that procedure remains unsure and undeveloped. *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *see Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 505 n.8 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991). In *Austin*, the court found no Hawaiian cases recognizing an inverse condemnation action, and held that until Hawaiian courts rejected such actions, a plaintiff could not be excused from seeking relief in state court before filing a taking claim in federal court. *Austin*, 840 F.2d at 681; *see also Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 513-15 (1st Cir. 1987) (taking claimant required to seek compensation from the Commonwealth of Puerto Rico, given that the Supreme Court of Puerto Rico has discussed the availability of, but has never awarded damages in, an inverse condemnation action); *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986) (Plaintiff must seek compensation from the State of Minnesota, "[u]ntil the Minnesota courts have ruled that an inverse condemnation procedure may not be brought or denies damages in such an action.").

Southview contends, however, that *Preseault v. ICC*, 494 U.S. 1 (1990), as well as *Williamson*, mandate that only a statutory remedy can represent an adequate state compensa-

tion procedure. Southview would have us excuse it from seeking compensation in state court because Vermont has no statutory provision for inverse condemnation. Nothing in either *Preseault* or *Williamson*, however, states or implies that the compensation procedure need be statutory. We therefore reject Southview's contention that only a statutory compensation scheme can suffice, and we see no reason to depart from the view, expressed in *Austin* and other cases, of what represents an adequate state procedure for obtaining compensation for a taking. We next examine Vermont law to determine whether it provides such an adequate procedure.

Our search of the Vermont Reports has revealed nothing—neither judicial recognition nor rejection of inverse condemnation actions. Nor has Vermont legislated a cause of action for inverse condemnation. Yet Vermont provides a route whereby Southview may seek compensation in its courts.

The Vermont Constitution has always provided—and was the first state constitution to do so—that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. ch. 1, art. 2. The Supreme Court of Vermont has relied on this provision to rule favorably on a cause of action for compensation where government has taken private property through physical damage rather than an eminent domain proceeding. *See, e.g., Timms v. State*, 139 Vt. 343, 344-46, 428 A.2d 1125, 1126 (1981) (awarding damages to landowner, on account of a taking of private property, precipitated by the state's damage to landowner's well); *Sargent v. Town of Cornwall*, 130 Vt. 323, 328-29, 292 A.2d 818, 822 (1972) (holding that plaintiff stated a cause of action for a taking, for which municipality must compensate, on account of flooding of private property); *Griswold v. Town School District*, 117 Vt. 224, 224-27, 88 A.2d 829, 829-31 (1952) (holding that plaintiff stated a cause of action for a taking on account of the school

district's diversion and appropriation of plaintiff's water supply). Thus, the Vermont Supreme Court recognizes a cause of action for a taking generally, even if it has yet to decide whether recovery can be had for a regulatory taking. These precedents indicate that Southview cannot establish, at this time, that Vermont's procedure is either "unavailable or inadequate." *Williamson*, 473 U.S. at 197. Vermont has an adequate procedure that Southview must use—a suit in state court—before it asserts a section 1983 claim based on a regulatory taking. Because Southview has never sought compensation in the Vermont courts, its taking and substantive due process claims (premised on the theory that the Board has gone "too far") are not ripe.

Accordingly, we affirm the dismissal of Southview's regulatory taking and due process claims for lack of ripeness, and for my colleagues this ends the opinion so that anything that follows represents only my own views and not the opinion of the panel.

Were we to reach the substantive due process and regulatory claims on the merits—i.e., if our determination on the ripeness issue was in some way erroneous—I would dismiss them on their merits. Thus, I address Southview's next argument, namely, that the district court improperly dismissed its claim that the Board violated its right to substantive due process because the Board's action—denial of an Act 250 permit—deprived it of "fundamental [property] rights without any compelling state interest narrowly tailored to accomplish the purported public purpose." Southview also contends that it alleged sufficient facts to support its claim that the Board acted arbitrarily and capriciously in denying the Act 250 permit. I disagree.

1) Arbitrary and Capricious Government Conduct

In evaluating a landowner's claim that a denial of a permit for a regulated use of land offends the landowner's right to substantive due process under the "arbitrary and capricious" government conduct theory, a court first asks whether "an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether . . . government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously." *RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911, 917 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *see also Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 60 (2d Cir. 1985) (Because zoning board, even if acting lawfully, was not required to grant zoning approval, plaintiffs "lack any property interest protectible under the Due Process Clause."). This inquiry, the threshold *Board of Regents v. Roth* entitlement test, stems from the notion that a property right exists in *what is sought*—in addition to the property interest that exists in *what is owned*—provided there is a "legitimate claim of entitlement." *RRI Realty Corp.*, 870 F.2d at 915 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). A landowner has a legitimate claim of entitlement when, "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Yale Auto Parts*, 758 F.2d at 59.

Moreover, *RRI Realty Corp.* teaches that this test does not turn on the probability that the government authority will approve the use that the landowner seeks. *RRI Realty Corp.*, 870 F.2d at 918. Instead, the central factor is the degree of discretion possessed by the regulating body. *Id.*; *see also Dean Tarry Corp. v. Friedlander*, 826 F.2d 210, 213 (2d Cir. 1987) (Property owner's expectation of success in receiving

planning board approval for his project did not give rise to a cognizable property right on account of the broad discretion that the zoning ordinance conferred on the planning board.) And the requisite "strong likelihood" of approval exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI Realty Corp.*, 870 F.2d at 918. In *RRI Realty Corp.*, we found that the official body at issue, the Village of Southhampton Architectural Review Board, enjoyed wide discretion in passing on design plans on account of its power to "exercis[e] sound judgment and . . . reject[ ] plans which, in its opinion, are not of harmonious character because of proposed style, materials, mass, line, color." *Id.* at 919 (quoting Southhampton, N.Y., Code § 116.33B (1984)). Thus, we direct our attention to the powers of the Vermont Environmental Board to determine whether it lacked the discretion to deny the Act 250 permit—thereby according Southview an entitlement to the permit.[9]

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9 We previously have applied the *Roth* test to substantive due process claims arising from government land use decisions such as a local authority's denial of a building or zoning permit. I see no relevant distinction, however, between local zoning and building regulations and the state-wide land use scheme embodied in Act 250. Both may diminish the value of property by barring a potential use, but the loss of value is likely offset in part "by an increase in value which flows from similar restrictions as to use on neighboring properties." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 139-40 (1978) (Rehnquist, J. dissenting). Act 250, as with zoning regulations within a municipality, applies to all property owners within the State of Vermont, "not only for the benefit of [the state] as a whole but also for the common benefit of one another," yielding "an average reciprocity of advantage." *Id.* at 140 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). This rationale would seem especially compelling in the context of a mountain-area vacation home development, where the uses to which other landowners put their property, and the resultant quality of the surrounding environment, is quite relevant to the market value of the lots. Accordingly, I would find the *Roth* test applicable to Act 250 permit determinations.

The central issue before the Board was whether Southview had met the requirements of Criterion 8(A). Thus, the Board first had to determine whether any party opposing Southview's application had demonstrated that the subdivision would "destroy or significantly imperil necessary wildlife habitat." *See* 10 V.S.A. § 6086(a)(8)(A) (1984). If the Board answered this question in the affirmative, it also had to decide (1) whether "the economic, environmental or recreational loss to the public from the destruction or imperilment of the habitat" is outweighed by the "economic, social, cultural, recreational or other benefit to the public" that the subdivision would yield, *id.*; (2) whether "all feasible and reasonable means of preventing or lessening the destruction, diminution or imperilment of the habitat" have been or will continue to be applied, *id.*; and (3) whether the applicant owns no "reasonably acceptable alternative site" which would "allow the . . . subdivision to fulfill its intended purpose." *Id.* As demonstrated by its decision in this case, the Board may deny a permit if it determines that the applicant's project fails to meet one of these three "subcriteria."

These standards conferred considerable discretion on the Board in its determination of whether Southview had met the relevant Act 250 criteria. All parties agreed that the proposed development was in a deeryard. The Board had to decide how the subdivision would affect the deer's habitat, and whether that habitat was "necessary" within the meaning of the statute. Given its finding on these issues, the Board also had to examine the "subcriteria." Application of any one of them—requiring the Board to weigh the public benefit and loss, or make "reasonableness" determinations—would call for the exercise of a large measure of discretion. I would hold that, as in *Yale Auto Parts* and *Dean Tarry*, this discretion prevented Southview's "expectation of success from rising to the level of certainty required to give rise to a . . . property right" cognizable under the Fifth and Fourteenth Amendments. *Dean*

Tarry, *826 F.2d at 213 (citing Yale Auto Parts*, *758 F.2d at* 59-60). Thus, my view is that Southview's substantive due process claim must fail.

Even if Southview's expectation of receiving an Act 250 permit were sufficiently certain to give rise to a cognizable property right, Southview has still failed adequately to allege a substantive due process violation. On a general level, substantive due process protects against arbitrary government conduct. *United States v. Certain Real Property*, 954 F.2d 29, 33 (2d Cir.) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)), *petition for cert. filed* (April 20, 1992). In the zoning context, a government decision regulating a landowner's use of his property offends substantive due process if the government action is arbitrary or irrational. *See Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *see also Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990). Government regulation of a landowner's use of his property is deemed arbitrary or irrational, and thus violates his right to substantive due process, only when government acts with "no legitimate reason for its decision." *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 & 479 U.S. 822 (1986); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance violates substantive due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (9th Cir. 1989) ("[M]alicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power."), *cert. denied*, 494 U.S. 1016 (1990). In addition, our precedents caution that, although we will not countenance a constitutional violation, federal courts should not become fora for appellate review of "nonconstitutional land use determinations." *Brady*, 863 F.2d

at 215 (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986)).

In support of its claim that the Board acted arbitrarily and irrationally, Southview's complaint alleges that "similar residential subdivisions . . . on lands essentially identical in character" to its property "were approved by the District II Environmental Commission," and those developments "destroyed or imperiled Deer Yards identified by the Department." Southview's complaint also alleges that the white-tailed deer "are neither endangered nor threatened species in the State of Vermont" and "in fact, the State, each Fall, encourages the slaughter of an unlimited number of . . . deer." These alleged facts, even if proved, would not in my opinion establish that the Board acted irrationally or arbitrarily in denying the permit application.

Southview's assertions regarding the treatment of other similar developments are more relevant to a claim of a denial of equal protection,[10] rather than a violation of substantive due process. Nevertheless, if *identically* situated developments were granted permits, perhaps an inference of arbitrary or irrational conduct might arise. Southview, however, alleged only that "*similar* residential developments" on "*essentially* identical" properties were granted permits (emphasis added).

Moreover, had Southview amended its complaint to allege that identically situated developments were granted permits, dismissal would still be required. If the Board had " 'at least debatable' " grounds, *Shelton*, 780 F.2d at 483 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)), for distinguishing its action on Southview's application from

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10 On appeal, Southview has advanced no claim of error with respect to the district court's dismissal of its equal protection claim.

its conduct with respect to other subdivisions, the Board did not act arbitrarily and capriciously and did not deprive Southview of substantive due process. *See id.* at 485. Southview apparently did not assert any arguments, either before the Commission or the Board, regarding the treatment accorded other subdivisions. The Board, therefore, did not specifically compare Southview's proposal to similar subdivisions, and it set forth no grounds for distinguishing the Southview plan from other developments. The Board based its decision on the merits of Southview's project.

In so doing, the Board did underscore, however, that the property was situated within the only active deeryard remaining in a 10.7 square mile area, and the development contemplated destruction of 10 acres of the most important habitat in this deeryard. These facts indicate that the Southview project was configured in a way that would inflict very serious damage to a deeryard unique to the area. Thus, these special factors underlying the denial of Southview's permit undermine any inference that the Board lacked "at least debatable grounds" to distinguish the Southview plan from other developments to which permits were allegedly granted. Under these circumstances, I believe it is Southview's burden to allege some facts tending to prove that the Board had no grounds to distinguish the complained of government action from the government treatment of identically situated applicants.

Southview's complaint is devoid of any such facts. Southview's bare allegation regarding other developments, without more, hardly precludes the existence of "at least debatable grounds" for distinguishing the Board's denial of Southview's application from the other unnamed residential developments. Therefore, Southview's allegations regarding other developments are, I think, insufficient to enable it to

establish a denial of substantive due process. *See Shelton*, 780 F.2d at 485.

Southview's allegations regarding the incongruity of protecting deer habitat in light of the health of the Vermont white-tailed deer population and the State's hunting policy are also insufficient in my opinion. To the extent Southview questions the policy implicit in the protection of deer habitat, Southview's dispute is with Act 250 and the Vermont Supreme Court's interpretation of it, not with the rationality of, or justifications motivating, the Board's denial of its application. It was the Vermont Supreme Court, not the Board, that finally determined that "a 'necessary wildlife habitat' under Act 250 is one that is decisive to the survival" of those members of the species that depend on it. *Southview*, 153 Vt. at 176, 569 A.2d at 503 (quoting 10 V.S.A. § 6086(a)(8)(A) (1984)). Southview, however, does not challenge the statute.

Furthermore, neither the Board's alleged treatment of other developments nor the alleged hypocrisy of protecting deer habitat negate the conclusion that the Board "articulate[d] a rational basis that was indisputably related to the general welfare, [and] there was no question but that the articulated basis was a basis for [the] decision." *Shelton*, 780 F.2d at 481. Indeed, there is no reason to believe, and Southview has not alleged, that the justifications articulated by the Board were not the *sole* reasons for its decision.

Southview does not dispute that the Board denied the permit because (1) the proposed subdivision was located in the last remaining deeryard in the 10.7 mile watershed; (2) the proposed subdivision would destroy 10 acres of critical softwood cover within the property and imperil the remaining 34; and (3) Southview failed to situate the subdivision on other areas of its property where the development would have had far less impact on the deer. Nowhere does Southview claim

that the Board did not rely on these findings in reaching its decision, nor does it dispute the veracity of these findings. Indeed, it agreed that the development was within a deeryard. Nor does Southview allege that the Board acted contrary to the dictates of Act 250 or contrary to any other state law.

By contrast, when our Court, as well as other Courts of Appeal, have found an allegation of a deprivation of substantive due process sufficient to warrant an adverse judgment against a governmental body, the plaintiffs have pleaded or presented evidence indicating that the body acted beyond its authority, without justification, or committed other egregious misconduct. *See, e.g., Brady*, 863 F.2d at 215-16 (If members of town planning and zoning commission "had no authority under state law to revoke [plaintiff's] building permit, to demand that [plaintiff] apply for zoning permits and certificates of occupancy, and to subject him to the overall approval process, then a trier of fact could conclude that there was no 'rational basis' for the [commission's] actions," and therefore it violated plaintiff's substantive due process rights.); *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986) (If town officials refused to issue certificates of occupancy to developer for a reason that was contrary to state law, such a refusal "would constitute a deprivation of property without due process"); *Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (Plaintiffs properly stated a due process claim by alleging, with supporting affidavits, that the city had approved their 190-unit project but later abruptly rejected the plan for broad conclusory reasons; and that the rejection was actually motivated by political pressure rather than by legitimate regulatory concerns.); *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3rd Cir. 1988) (If plaintiff proves that municipal officials interfered with the municipality's building permit issuance process based on partisan political or personal reasons unrelated to the merits of the permit application, plaintiff

would establish a substantive due process violation.), *cert. denied*, 488 U.S. 868 (1988). Southview's allegations regarding the Board's conduct fail to approach this kind of illegitimate government action. Even if true, the allegations would not demonstrate that the Board's decision was arbitrary, irrational or otherwise lacking in legitimate justification, and accordingly Southview's substantive due process claim should fail on the merits.

Were the regulatory claim ripe, I would dismiss it anyway on the ground that Southview's allegations are insufficient to state a claim that the Board has committed a regulatory taking.

In determining what constitutes a taking, I would begin with the classic, if vague, formulation provided by Mr. Justice Holmes: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Mahon*, Pennsylvania's statute went "too far" by forbidding, under certain circumstances, the mining of anthracite coal when it would cause subsistence of a dwelling, even if the coal company owned the right to mine the coal as well as the right of support of the surface.[11] *Id.* at 412-13. Since *Mahon*, courts have struggled with limited success to devise a principled yardstick for measuring when regulation has reached "too far." *See Rose*, *supra*, at 562.

The shortcomings of the *Mahon* approach—shortcomings that still fuel seemingly inconsistent applications of the Takings Clause—were perhaps revealed in *Miller v. Schoene*, 276

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11 Pennsylvania common law, at the time, recognized three distinct estates in mining property: the surface, the right of support, and the right to mine below the surface. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 563-64 (1984).

U.S. 272 (1928), decided less than six years after *Mahon*. In an opinion joined in by Mr. Justice Holmes, the Court examined a Virginia statute that required landowners to cut ornamental red cedar trees, infected with cedar rust, in order to protect apple orchards from the disease. *Miller*, 276 U.S. at 277-78. Cedar rust did no harm to the infected red cedar trees, but the state-ordered destruction of the trees allegedly caused the plaintiffs an uncompensated five to seven thousand dollar loss in the value of their property. The Court upheld the statute in the face of a taking and due process challenge without even mentioning, much less distinguishing, *Mahon*.[12] *Miller*, 276 U.S. at 279-81; *see* Oakes, *supra*, at 605-06.

Unsurprisingly, in the wake of *Mahon*, *Miller* and other cases, the Court has proved unable to arrive at a "set formula to determine where [land use] regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Instead, the Court "engage[s] . . . in essentially ad hoc, factual inquiries" to decide "when 'justice and fairness' require that economic injuries caused by public

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12 Moreover, many believe *Mahon* was substantially overruled in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, the Court rejected a facial attack, under the Takings Clause, on the Subsistence Act, a Pennsylvania mining statute. *Id.* at 501-02. The Subsistence Act, however, interfered with the property interests of mining companies in a manner "strikingly similar" to the Kohler Act—the act at issue in *Mahon*. *Keystone*, 480 U.S. at 506-07 (Rehnquist, J. dissenting).

However, *Mahon* was heavily relied upon by the majority in *Lucas*. And the *Keystone* majority, as well as Mr. Justice Stevens, dissenting in *Lucas*, distinguished *Mahon* from *Keystone* on the basis that "the regulatory function of the [Subsistence Act]" was substantially broader." *Id.* at 2923 (Stevens, J. dissenting) . As Mr. Justice Stevens explained: "Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsistence Act affected all surface owners—including the coal companies—equally." *Id.* (citing *Keystone*, 480 U.S. at 486).

action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124 (citing *Goldblatt*, 369 U.S. at 594); *see also Lucas*, 112 S. Ct. at 2893; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Even though this inquiry may be "ad hoc," the cases provide some additional guidance. A regulation will not effect a compensable taking if it "substantially advance[s] legitimate state interests" and leaves the "owner [with an] economically viable use of his land."[13] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see Keystone*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). By contrast, a taking will generally be deemed to have occurred if the regulation authorizes a permanent physical occupation, *see Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992), or, in the "extraordinary circumstance," *Lucas*, 112 S. Ct. at 2894, when regulation "deprives land of *all economically beneficial use*." *Id.* at 2900 (emphasis added).

1) Economic Impact

In deciding whether Southview retains *any* economically viable use of its land (as opposed to *none*, the dictionary opposite of "all"), I note that a regulation that forbids a landowner from putting his property to its most economically beneficial use does not, in and of itself, give rise to a taking. *See Goldblatt*, 369 U.S. at 592; *see also Andrus v. Allard*, 444 U.S. 51, 66 (1979) (upholding regulation even though it undeniably "prevented the most profitable use" of the claimant's property). Indeed, "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests."

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13 The economic effect of a taking has also been characterized as "undue interference with . . . investment-backed expectations." *Keystone*, 480 U.S. at 485.

Keystone, 480 U.S. at 489 n.18 (citing cases). As Mr. Justice Holmes explained, these losses incurred by landowners reflect the fact that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change." *Mahon*, 260 U.S. at 413; *see also Andrus*, 444 U.S. at 65 ("[G]overnment regulation—by definition—involves the adjustment of rights for the public good."). With this in mind, I would turn to the economic effect, on Southview, of the Board's application of Act 250.

Southview purchased the property at issue for $225,000. Had a permit been granted, it alleges that it would have incurred expenses for construction of roads, sewers and utilities and the like, as well as marketing expenses, totalling $1,155,000.[14] Southview contends that it would have reaped profits of between $2,100,000 and $3,125,000 from the sale of 33 lots—an approximate return on investment of between %150 and %225.

Moreover, Southview claims that because 44 acres of its land has been designated a deeryard, it is unable to develop its property. It alleges that the Board "deprived [it] of all economically viable uses of that [p]roperty in relation to Southview's reasonable expectations that the [p]roperty would be developed as a planned residential subdivision, and . . . further prevented Southview from earning a reasonable return on its investment commensurate with its reasonable investment-backed expectations." Southview also asserts that it made an "extensive effort to reduce the scale of the [p]roposed [d]evelopment to satisfy the concerns" the Board had regarding the deeryard.

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14 In its Act 250 application, however, certified as true and accurate by its general partner, it indicated a construction cost of $250,000 for a 32 lot residential development.

In assessing whether Southview retains an economically viable use of its land, I would first reject Southview's assertion regarding its "extensive effort" to reduce the scale of its development to satisfy the Board since no facts support this assertion. Indeed the Board found, and Southview does not dispute, that limited sewage capacity required it to scale down its project from 78 to 33 lots.

Despite the Board's decision with respect to its application, and the alleged permanent designation of 44 acres of its property as deeryard, the Board's actions have no effect on Southview's ability to use the parcel in a way that does not require Act 250 review. The Board's decision leaves intact Southview's existing ability to (1) construct improvements for farming, logging or forestry, 10 V.S.A § 6001(3) (Supp. 1991) (an orchard or a christmas tree farm may be possible); 2) construct residential or commercial improvements "involving" less than ten acres of the property,[15] *id.*, (an inn or private wooded estate, both common usages in the region, may be possible); 3) construct and sell up to nine homes, *id.*, (provided such activity involves less than ten acres); 4) subdivide and sell up to nine lots, 10 V.S.A. § 6001(19); *see* 10 V.S.A. § 6081 (1984). Finally, Southview can make considerable recreational use of the land. For example, its owners can walk, camp, cross-country ski, snow-mobile, observe wildlife, and even hunt deer on this land.

What Southview cannot do, of course, is build the exact residential subdivision for which it sought an Act 250 permit. But neither the Board's rejection of the permit in question nor the alleged designation of the deeryard on its land preclude

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15 With respect to the meaning of "involving," section 6001(3) explains: "In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings." 10 V.S.A. § 6001(3) (Supp. 1991).

development of a modified vacation home subdivision subject to Act 250 review. The Board's decision shows that its concern centers on the 44-acre area forested with critical softwood cover. The Board's decision also indicates that it would be receptive to a subdivision proposal that situated the lots away from the critical softwood cover area, or one that reduced the magnitude of the development generally.

Eighty-eight acres is a considerable amount of land for the construction of a thirty-three vacation home subdivision, especially one designed like the Southview plan. As we explained, Southview's project contemplated clustering the 33 units into 12 acres, and directly developing only a total of 23 acres. Both Southview's allegations and the Board's findings indicate that Southview could situate a subdivision on its property—similar to the one described in its Act 250 permit application—without directly destroying any of, and minimizing the secondary impact on, the critical 44-acre cover area. Indeed, Southview's original plan left a large portion of the land undeveloped anyway. The Board's decision appears to reflect a favorable disposition towards such a modified proposal.

Furthermore, to the extent Southview's reasonable investment-backed expectations have been affected by the Board's actions, Southview could not have reasonably expected that its plans would have been permitted to proceed willy-nilly. Rigorous Act 250 review seems the norm, not the exception. The fact that Southview must now modify the configuration of its subdivision proposal if it wishes to obtain Act 250 approval does not, in my view, unduly interfere with its reasonable investment-backed expectations.

Southview's ability to develop its land has indeed been limited. Perhaps the subdivision proposal rejected by the Board was the most profitable configuration possible. However, based on Southview's allegations and the undisputed

findings of the Board, I believe that Southview cannot establish that it has been deprived of economically viable use of its land. *See Agins*, 447 U.S. at 260.

2) Substantial Advancement of a Legitimate State Interest

The inquiry would next focus on whether the Board's actions "substantially advance[ ] legitimate state interests." *Nollan*, 483 U.S. at 834 (quoting *Agins*, 447 U.S. at 260); *see Keystone*, 480 U.S. at 485. The Court has developed no litmus test for identifying a "legitimate" state interest. *Nollan*, 483 U.S. at 834. Instead, as the *Nollan* Court explained, a wide array of government purposes are deemed "legitimate," including, for example, landmark preservation, scenic zoning, and residential zoning. *Id.* at 834-35. (citing *Penn Central*, 438 U.S. at 127; *Agins*, 447 U.S. at 260-62; and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). To meet the requirement that the regulation "substantially advance" the state interest, there must be a nexus between the prohibition mandated by the regulation and the goal advanced by the state as the justification for the prohibition. *Nollan*, 483 U.S. at 837.

Here, on a general level, the Vermont Legislature found that regulation was necessary to control uses of the land that did not serve the needs of the people of Vermont. Findings and declaration of intent, 1969, No. 250 (Adj. Sess.), § 1, in 10 V.S.A. annotations following § 6001 (1984). Accordingly, the legislature sought to permit land uses that were not unduly destructive to the environment and that promoted the general welfare. *Id.* On a more specific level, the legislature subsequently stated that "conservation of the recreational opportunity afforded by the state's . . . forests . . . are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby." 1973 Capability and development

plan; statement of intent and findings, 1973 No. 85, § 7, in 10 V.S.A. annotations following § 6042 (1984). The legislature also determined that "[t]he use and development of land and waters should occur in such a way as not to significantly diminish the value and availability of outdoor recreational activities to the people of Vermont, including hunting." *Id.*

Indeed, the government of Vermont has long valued and protected hunting. Since the adoption of the Vermont Constitution by the Republic of Vermont in 1777, Vermonters have had a constitutional right to hunt. Vt. Const. ch. II, § 67. And the tens of thousands of people who hunt in Vermont, both Vermonters and visitors from other states, would likely identify white-tailed deer as the most prized big game animal in the State. In order to preserve the deer herd for future generations, the State has enacted laws and promulgated regulations regarding hunting of white-tailed deer. *See, e.g.*, 10 V.S.A. § 4741 *et seq.* (1984 & Supp. 1991) (specifying, among other things, when, how, and what type of deer may be hunted); *see generally* Vermont Department of Fish and Wildlife, *Deer Management Plan for the State of Vermont, 1990-95* 2-6 (June 1990).

Preservation of a healthy white-tailed deer herd, through habitat protection and hunting regulation, serves more than just the interests of hunters. Hunting is important to the economic health of the state, bringing in visitors whose spending boosts local businesses and yields tax revenues. The fees charged for hunting licenses—between $12 (resident) and $75 (nonresident), Vermont Fish and Wildlife Department, *Vermont Digest of Fish and Wildlife Laws* 13 (1992)—add to the state's revenues as well.

Preservation of the white-tailed deer also enables people to observe the deer, and as the Board found, "provides the more

intangible benefit of knowing that the deer exist." Put simply, white-tailed deer are part of Vermont's heritage.[16] I believe that the government's goal of protecting deer and their habitat under Criterion 8(A) of Act 250 is for the benefit of the public and undeniably represents a legitimate state interest. *See Agins*, 447 U.S. at 261; *Keystone*, 480 U.S. at 487, 492.

I also believe that a sufficient nexus exists between the Board's actions—denial of Southview's application and alleged permanent designation of Southview's property as within a deeryard—and the state's goal of protecting deer and their habitat. Southview agrees that the deeryard is on its property. Southview does not dispute the Board's findings that (1) destruction of deeryard has occurred in the Stratton area; (2) the Southview property is within the last deeryard in a 10.7 square mile area; (3) the Southview project, as proposed, would destroy 10 acres and imperil 34 acres of the best habitat remaining in the deeryard; (4) the development, as proposed, would likely cause the 20 deer that use the habitat to abandon it and reduce their ability to survive in wintertime;

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16 In *Conservation Society of Southern Vermont, Inc. v. Volpe*, 343 F.Supp. 761, 767 n.1 (1972), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *vacated*, 423 U.S. 809 (1975), the court quoted the following:

> Green Mountain Mary, Green Mountain Mary,
> What does your garden grow?
> Violets, moss, ground pine, goldenrod, briars,
> Strawberries, hardhack, wintergreen, ferns,
> And a little bit of grass, alas.
> Will you sell me your meadow?
> Oh, no.
> Who crops it?
> Deer.
> See here, Green Mountain Mary, you people are very,—
> Excuse me—
> Queer.
>
> G. Taggard, "The Nursery Rhyme and the Summer Visitor," *A Part of Vermont* (1945), quoted in *Time in New England* 231 (1950).

and (5) the "cumulative effect of development in the state is a threat to the entire deer herd."

Southview argues that the deer are neither an endangered nor threatened species in Vermont. Historical experience teaches, however, that today's plentiful species may become tomorrow's endangered or even extinct species—witness the fates suffered by the American Bison and the Passenger Pigeon. It is my view that the white-tailed deer population in Vermont need not deteriorate to such a level before the protection of their winter habitat—especially in an area where little such habitat remains—can be said to "substantially advance" Vermont's interest in preserving a healthy and populous deer herd. In fact, it is difficult to imagine a decision rooted in sound game-management principles that would fail substantially to advance legitimate state interests. *See generally Christy v. Hodel*, 857 F.2d 1324, 1330-31 (9th Cir. 1988) (Federal regulations regarding the killing of grizzly bears rationally advance a legitimate government objective.), *cert. denied*, 490 U.S. 1114 (1989). Thus, it is my view that under the circumstances of this case, Southview cannot prove that the Board's actions fail to "substantially advance legitimate state interests."

I conclude that Southview may suffer some economic loss because it can no longer put its property to the precise use for which it sought an Act 250 permit, but that in no way does this potential loss effect a compensable taking.

The restrictions imposed on Southview by the Act 250 process redound to the benefit of the public, both Vermonters and non-residents alike. These limits apply to all who seek to place a development—large enough to invoke Act 250 jurisdiction—within the State of Vermont. That all such landowners are subject to these limits enhances the fairness of the statute's permit review process. Moreover, the widespread applicability of the restrictions preserves the natural, un-

spoiled qualities of Vermont—including the presence of the deer. It is qualities like these that render Vermont an economically viable place for Southview to situate a vacation home development. Like any property owner, Southview can exploit these qualities for profit; but it cannot avoid its responsibility to refrain from destroying them in the process.

Having stated these views on the merits of the substantive due process and regulatory taking claims as my own, I nevertheless unqualifiedly join my colleagues in believing that affirmance of the dismissal of these claims for lack of ripeness as above stated is required.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil No. 91-200

SOUTHVIEW ASSOCIATES, LTD.;
SOUTHVIEW AT STRATTON PARTNERS

v.

INDIVIDUAL MEMBERS OF THE
VERMONT ENVIRONMENTAL BOARD;
FERDINAND BONGARTZ, LIXI FORTNA,
ARTHUR GIBB, SAMUEL LLOYD,
WILLIAM MARTINEZ, CHARLES STORROW,
STEVE WRIGHT, and the CHAIRMAN
OF THE ENVIRONMENTAL BOARD,
ELIZABETH COURTNEY

OPINION AND ORDER

On August 27, 1991, defendants, all present members of the Vermont Environmental Board, filed a motion to dismiss the complaint of plaintiffs Southern Associates Ltd. and Southview at Stratton Partners ("Southview"). In support, defendants allege that the Eleventh Amendment to the United States Constitution precludes federal court jurisdiction and that the matter is not ripe for review. A hearing was held on November 27, 1991. For the reason stated herein, defendants' motion to dismiss is granted.

Background

Southview is the owner of approximately 88 acres of land in the towns of Stratton and Jamaica, Vermont. In February of 1985, Southview submitted an Act 250 application to the District II Environmental Commission ("Commission") for a state land use permit - an Act 250 permit - for their proposed 33 lot development scheme. Hearings were held between February 1985 and April 1986. The Commission denied Southview's Act 250 permit application on the basis that criterion 8(a) of Act 250 was not satisfied.

Criterion 8(a) aims to preserve necessary wildlife habitats and endangered species in development projects. Specifically, the Commission, on evidence and information provided by the Vermont Department of Fish and Wildlife ("Department"), determined that a deeryard area consisting of approximately 280 acres overlapped with 44 acres of Southview property, and that 10 of these 44 acres were involved in the proposed development. The Commission concluded that Southview's proposed 33 lot development would significantly impair the deeryard, and therefore denied Southview an Act 250 permit.

Southview appealed the Commission's ruling to the Vermont Environmental Board ("Board") on or about May 14, 1986. The Board denied Southview's appeal on June 30, 1987 due to the predicted adverse impact the development would have on the deeryard. Southview then appealed the Board's decision to the Vermont Supreme Court. The Court affirmed the Board's decision in In re Southview Associates, 153 Vt. 171 (1989).

In its present and lengthy complaint, Southview is suing the individual members of the Board, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, the due process and equal protection clauses of the Fifth and Fourteenth Amendment to the United States Constitution and 28 U.S.C. §§ 2201 and 2202.

Essentially, Southview alleges that the Board, by denying Southview's Act 250 permit for its 33 lot development scheme in order to protect the deer, has deprived Southview of the economic use of its property. Southview further claims that the Board's application of criterion 8(a) of Act 250 to the specific 33 lot proposed development plan was unconstitutional.

Discussion

Defendants raise two arguments in its motion to dismiss that allegedly bar the present action by Southview - the Eleventh Amendment and the ripeness doctrine. We agree with defendants that Southview's action is not yet ripe for review. In order for this court to exercise jurisdiction over Southview's claims, there must be a case or controversy within the meaning of Article III of the United States Constitution. Because we find that the ripeness issue is dispositive, we address only that issue and do not reach the Eleventh Amendment question.

I. Ripeness Doctrine

In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), the Supreme Court set forth a two-part test that must be satisfied before a regulatory taking claim will be ripe for review: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" and (2) the plaintiff has sought compensation if the state has provided a "reasonable, certain and adequate provision for obtaining compensation." Id. at 186, 194. Southview admits that it has no pending application for an Act 250 permit; however, Southview argues that because the present matter is a "physical invasion" type takings case and because it is claiming a deprivation of due process and equal protection rights, there is no requirement that it resubmit another application. Southview relies on Sinola Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) for the proposition

that when an equal protection or due process challenge is made in cases where a physical invasion of property has occurred, the first prong of the Williamson test is met automatically and the second prong is inapplicable. Id. at 1402, 1404.

We disagree with Southview's assertion that the Williamson two-part test is inapplicable for two reasons: (1) Southview has failed to sufficiently plead either a substantive due process or equal protection violation, and (2) this is a regulatory takings case and not a physical invasion case.

First, we do not believe that Southview has sufficiently alleged a substantive due process violation. In order to establish such a violation, Southview must show that the Board's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Sinola Lake, 882 F.2d at 1407, quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Nowhere in its complaint does Southview allege that the individual members of the Board acted arbitrarily, deliberately, maliciously or irrationally in denying Southview's Act 250 permit application for the 33 lot development plan. Southview is merely unhappy with the Board's decision that maintenance of the deeryard on Southview's property is in the public interest.

Likewise, we do not believe that Southview has sufficiently alleged an equal protection violation. In its complaint, Southview contends that Act 250's exclusion of certain property owners from Act 250 coverage violates the equal protection clause.[1] Again, Southview has made no showing that these statutory exclusions

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[1] Act 250 excludes certain groups of landowners from its reach. For example, owners who subdivide their property into fewer than 10 lots within a 5 year period or owners who construct less that 800 feet of road for access to their lots are excluded from Act 250 coverage. Further, loggers, orchardists and farmers who develop their properties related to their respective commercial enterprises are not subject to Act 250 jurisdiction.

resulted from arbitrary or irrational decision making. As with its substantive due process claim, Southview cannot merely allege on the face of the complaint that the forced physical invasion by the deer violates the due process and equal protection clause. Southview has failed to support its bare allegations with adequate facts.

Second, even assuming that Southview successfully alleged facts to constitute a due process or equal protection violation, we believe that the Board's denial of Southview's Act 250 permit did not result in the type of forced "physical invasion" contemplated in Sinola Lake. In that case, physical invasion occurred when defendants entered onto plaintiff's land, breached a dam and destroyed plaintiff's lake. 882 F.2d at 1401. Southview's simple allegation that the deer have physically invaded its property does not necessarily make this a physical invasion type case.

We find that this situation more closely approximates a regulatory takings case than a physical invasion case because it involves the diminution of the value and usefulness of Southview's property through regulatory action. See Hall v. City of Santa Barbara, 833 F.2d 1270, 1275 (9th Cir. 1986). In drawing this distinction, we note that the existence of deer on Southview's property does not resemble the typical physical occupation case. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). In Penn Central, a physical invasion case, New York City prohibited Penn Central from building a 55 story office tower over its Grand Central Terminal. In our situation, the Board, in denying the Act 250 permit, has not permanently occupied Southview's private property so as to effectively destroy Southview's rights to use, possess and dispose of its property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982). Southview still retains numerous possessory rights in the property. In sum, we find that the existence of deer on Southview's property does not resemble a typical physical invasion case and is better characterized as a

regulatory takings case. For all of these reasons, we find that the Williamson two-part test is applicable to this situation and the Sinola Lake exception to that test is inapplicable.

II. Application of the Williamson Test

A. First Prong

The first requirement of the Williamson two-part test requires the government entity charged with implementing the regulations to reach a final decision on the application of the regulations to the property at issue. 473 U.S. at 186. This requirement is necessary because if a property owner has not submitted a new application for a less intensive development plan, the court cannot determine with certainty that an owner has lost all economic benefit of the property because the new plan may have been approved. Id. at 187, 190-91. See also Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central, 438 U.S. at 104.

Here, the Board prohibited Southview from building 33 housing units on a specific location of its property because of the predicted adverse impact on the deeryard. Importantly, however, the Board stated that:

> The State testified that there are several alternative sites that could be developed with much less impact on the deeryard. The Board is not persuaded that [Southview] has thoroughly investigated the possibility of less intensive development in other areas of the site.

Complaint, Exhibit I, p. 10. The Board also found that Southview failed to investigate "all feasible and reasonable means of lessening the destruction and imperilment of the deer habitat." Id. Southview has declined to accept the Board's invitation to submit alternative development plans. If this court were to address Southview's claims at the present time, we would be required to speculate about possible development schemes that Southview may have proposed and whether the Board would have responded

favorably. In determining if Southview has been deprived of its economic use of the property, we cannot base our decision on imaginary applications.

Southview argues that the futility doctrine, an exception to the ripeness requirement, excuses Southview from further submissions of alternate development proposals. In support, Southview first alleges that despite good faith negotiation attempts with officials at the Department, the officials have consistently stated that they will oppose any development on Southview's property. Thus, Southview claims further plan submissions would be futile. Further, Southview contends that it already reduced its development plan once from 78 units to 33 units, and that anything less than 33 units would defeat its reasonable investment-backed expectations in the property. We find both of Southview's contentions to be without merit.

First, Department officials do not stand on the same footing as Board members; the former do not make final decisions on whether Act 250 permits will be granted but rather supply information and evidence which the Board may or may not consider. The Board sits as the final decision maker in environmental matters in Vermont. In re Hawk Mountain Corp and Our World Sewer Ass'n, Inc., 149 Vt. 179, 185 (1988). Thus, the fact that Department officials reiterated to Southview their intent to oppose any development on Southview's property does not by itself demonstrate that submission of alternate development plans will be futile. The Board explicitly encouraged Southview to submit alternate plans and never implied that it would oppose any development on the property.

Second, we find that Southview must explore alternate development plans before it can reasonably conclude that it cannot realize the profit from the property which it once envisioned. The Board found that the maximum number of units that could be built in the property was 33 due to sewage capacity. Complaint, Exhibit I, p.

3. Consequently, Southview's original plan to build 78 units would have failed regardless of any Act 250 permit denial, and Southview-'s implication that it trimmed its 78 lot plan to a 33 lot plan in an effort to compromise is misleading. We agree with the court in Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990) which stated: "[t]he rejection of exceedingly grandiose development plans is insufficient to show that the local agency does not allow reasonable development." Id. at 503. Southview must propose alternate development plans before this court will rule that Southview has been deprived of the economic use of its property. Because alternate development plans have not been submitted, we find that there has been no final decision by the Board concerning the application of Act 250 to the Southview property which would satisfy the first prong of the Williamson test.

B. Second Prong

The second prong of the Williamson two-part test requires an owner to seek compensation from the state if the state has a "reasonable, certain and adequate provision for obtaining compensation." 473 U.S. at 194. This hurdle is required because the Fifth Amendment only proscribes the taking of property without just compensation, and unless an owner has sought compensation, there is no claim for a taking. Id. at 195-94.

Southview admits that it has not sought compensation in the Vermont state court system. However, Southview bases this failure on its allegation that neither Act 250 nor any other Vermont statute provides a reasonable, certain or adequate procedure to obtain compensation. We disagree. Southview has never obtained a decision from the Vermont state courts that compensation is disfavored or even unavailable. To the contrary, although Vermont does not provide a specific statutory procedure by which to obtain compensation, Vermont courts have certainly recognized the right of a property owner to bring an action for compensation pursuant

to Article II of the Vermont Constitution when there has been a taking of one's property for public purposes. See Timms v. State of Vermont, 139 Vt. 343 (1981); Sargent v. Town of Cornwall, 130 Vt. 323 (1972). The Williamson test does not require that the compensation be statutory in nature. Southview does indeed have a forum - the Vermont Superior Court - in which to pursue its compensation action. Consequently, Southview has failed to meet the second prong of the Williamson test.

Conclusion

We conclude that Southview has failed to meet the Williamson two-part test because the Board has not rendered a final decision as to the application of Act 250 to the Southview property, and Southview has failed to seek compensation within the Vermont state court system. Therefore, Southview's claims are not ripe. Thus, defendants' motion to dismiss Southview's complaint is hereby GRANTED.

SO ORDERED

Dated in Rutland in the District of Vermont this 6th day of December, 1991.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

APPENDIX C

VERMONT SUPREME COURT

Supreme Court Docket No. 87-313
Opinion Filed December 1, 1989

IN RE SOUTHVIEW ASSOCIATES

Appealed From Vermont Environmental Board
No. 2W0634-EB

Appeal from ruling of Environmental Board denying application for permit to build residential development. Environmental Board, *Bradley*, chairman, presiding. *Affirmed.*

Weber, Perra & Wilson, Brattleboro, for Appellant.

Jeffrey L. Amestoy, Attorney General, and *Mark J. DiStefano*, Assistant Attorney General, Montpelier, for Appellee.

Morse, J. Southview Associates appeals from a ruling of the Environmental Board denying its application for a permit to build a residential development in Stratton and Jamaica, Vermont. The Board based its decision on the finding that the proposed project failed to meet the requirements of Act 250 criterion 8 pertaining to "necessary wildlife habitat." 10 V.S.A. § 6086(a)(8)(A). We affirm.

Southview proposed to build a 33-lot subdivision for vacation homes on 88 acres of land, situated in a "deeryard" comprising some 280-320 acres. The Board found that, although Stratton once contained 600 acres of deeryard, the 280-320 acre area is the only "active deeryard" in a 10.7 square mile region. It supports approximately 20 deer over the winter. The deeryard contains two

significant areas of mature softwood cover, which is critical deer wintering habitat. One of these areas covers approximately half of the Southview property. The Board found that the softwood stand on the Southview property is necessary to the deer population. The development, it found, would destroy ten acres of this critical habitat, with likely secondary effects in a larger area.

Southview submitted a Wildlife Management Plan to mitigate the loss of the ten acres by increasing available deer food and encouraging the growth of immature softwood to replace the cover lost to the development. The Board found, however, that increased food supply would only partially mitigate the adverse effect of the development on the deer, as availability of browse is less important to the deer's survival than good softwood cover, which provides shelter from winter elements and reduces heat loss by radiation. Also, it is critical to the deer population's survival during winter that the deer do not exhaust their fat reserves. Increased physical activity due to the presence of humans, pets, and vehicles would consume these reserves more rapidly.

The Board concluded:

> As a result of the development, it is likely that there will be a loss of deer in this habitat. It is likely that the deer will abandon the remaining cover altogether and those that remain will be less likely to survive due to the high potential of stress created by wintertime noise and activity from people, vehicles, and pets.

The Board concluded further "that the environmental and recreational loss to the public from the destruction and imperilment of the habitat is not outweighed by the economic, social, cultural, recreational or other benefit to the public from the project." Nor did Southview, in the Board's opinion, employ "all feasible and reasonable means of preventing or lessening the destruction and imperilment of the deer habitat." Finally, the Board could not

exclude "the possibility of less intensive development in other areas of the site." The Act 250 permit was accordingly denied.

Southview challenges the Board's construction of the relevant statute and argues that the record does not support several of the Board's findings and conclusions.

I.

Under 10 V.S.A. § 6086(a)(8), a permit will be granted only if the subdivision or development "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." The subsection further provides:

> (A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and
>
> (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
>
> (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
>
> (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

The permit's opponents - here, the Agency of Natural Resources and the Vermont Natural Resources Council - thus have a dual burden: first, to show that the project "will destroy or significantly

imperil necessary wildlife habitat ~~or~~ any endangered species" (only the former is involved in this case); and second, to prove one of the three statements prefaced by small roman numerals.

Southview's first claim on appeal pertains to the meaning of "necessary wildlife habitat." That term is defined at 10 V.S.A. § 6001(12) as a "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods." Southview contends that the term refers to a habitat that is decisive to the survival of an entire species, rather than to the population of the species that resides in the habitat.

In reviewing a statute, we must construe its language so as to give effect to the legislative intent. We will avoid a construction that would render the legislation ineffective or irrational. State v. Rice, 145 Vt. 25, 34, 483 A.2d 248, 253 (1984); In re A.C., 144 Vt. 37, 42, 470 A.2d 1191, 1194 (1984).

With this rule of construction in mind, we turn to the question stated succinctly by the Board as follows:

> The threshold issue that must be decided is whether the language "necessary wildlife habitat" in 10 V.S.A. § 6086(a) and defined in § 6001(12), as it applies to the white-tailed deer in Vermont, means habitat that is decisive to the survival of the entire population of deer in Vermont or decisive to the survival of the deer that are dependent upon the habitat.

If the former definition controlled, only the last landowner in the state to develop a deeryard would be subject to the provisions of criterion 8. All other developers would escape a criterion 8 challenge because, no matter how devastating to particular habitats, their projects would not decimate the entire deer herd in Vermont so long as one deeryard remained. This interpretation would render the statute largely ineffective to accomplish its purpose of regulating development throughout the state with an eye to the preservation of

the natural environment. See 1969, No. 250 (Adj. Sess.), § 1. As the Board noted, "[t]he statute would be rendered meaningless if it were interpreted to mean that only the last deeryard in the state would be subject to review . . . so that the state deer herd would have to be on the verge of extinction before Criterion 8(A) would apply."[1] The Board must be afforded deference in its interpretation of its own enabling legislation. In re Eastland, Inc., 151 Vt. 497, 499, 562 A.2d 1043, 1044 (1989). We affirm the Board's conclusion that a "necessary wildlife habitat" under Act 250 is one that is decisive to the survival of the population of a particular species that depends upon the habitat.[2] The definition in § 6001(12) uses the words "a species" only to make clear that for habitat to be "necessary" under criterion 8 it need not be decisive to the survival of *all* species of wildlife that flourish there.

Southview vigorously argues that this construction of the statute produces its own absurdity: "For under the Board's definition, no matter how numerous and robust the deer herd in Vermont may be or become, and no matter how many acres of deeryard there may be in the State, if evidence indicates that a deeryard supports a few deer, and that part of it will be destroyed or significantly imperiled by development, that part is necessary wildlife habitat and may not be disturbed." Brief of Appellant, at 10. Southview's concern is overstated. First, the habitat must be "concentrated" and "identifiable." If it is not of a certain quality, it will not be deemed

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[1] The statute would be rendered even more irrational and contrary to its purpose if it were interpreted, as Southview appears to urge in parts of its brief, to mean that a habitat is "necessary" only if it is decisive to the survival of the species - not just in Vermont - but generally over the planet. Then, of course, *no* deeryard in the state could qualify as "necessary wildlife habitat."

[2] Accordingly, the Board correctly refused to make findings, as requested by Southview, on issues such as the total deer population and the total acreage of deeryard in Vermont.

"necessary" under the Act. Second, Southview ignores subparagraphs (i), (ii), and (iii) of criterion 8. The development's opponent must show not only that the development will destroy or imperil necessary wildlife habitat, but must *also* show that the benefits of the development to the public will not outweigh the loss, or that reasonable means of mitigating the loss have not been attempted, or that the developer owns or controls a reasonably acceptable alternative site for the project. In other words, contrary to Southview's dire predictions, the statute will not foreclose all useful and beneficial development projects whose negative impact on the natural environment is slight.

II.

Southview next argues that there is inadequate support in the record for the Board's findings and conclusions that the property contains habitat that is decisive to the survival of the deer that use it. In support of this argument, Southview points to testimony by witnesses for both sides of the dispute expressing reservations about the severity of destruction to the deeryard that Southview's proposed development would cause. These doubts and reservations do not, however, undermine the Board's initial determination that the Southview property contains necessary wildlife habitat.[3] There was ample evidence on that question, pertaining to the critical need

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[3] Southview appears to argue that because the evidence did not prove that all the deer would perish if the project were completed, the project's opponents failed to prove that the deeryard was "necessary wildlife habitat." This argument again misconstrues the terms of the statute. A concentrated, identifiable deeryard is "necessary wildlife habitat" if it is decisive to the survival of the white-tailed deer that use it during the winter - that is, if the deer require that sort of habitat to survive the winter. Of course, many of the individual animals might survive in another deeryard elsewhere in the state if the project were built; that fact does not render the area to be developed unnecessary to their survival in the sense contemplated by the Act. The contrary interpretation would lead to the absurd conclusion that no single deeryard in the state would qualify as necessary wildlife habitat.

of the deer population for softwood cover during the winter. One of the State's experts testified as follows:

> There is no question that all of Southview's property is a deeryard . . . . Without this deeryard there would be a net loss of deer in the area. This yard provides a haven for the deer that use it. It provides them with shelter that enables them to preserve the energy reserves necessary to get through the winter.
>
> [The proposed development] will significantly imperil the deeryard which is, of course, a necessary wildlife habitat for the approximately 20-50 deer that use it.

Several other witnesses also testified that the Southview property was decisive to the survival of the deer population.

We will not disturb the Board's findings of fact if there is substantial evidence in the record to support them. 10 V.S.A. § 6089(c); see In re Spear Street Assoc., 145 Vt. 496, 499, 494 A.2d 138, 140 (1985). The Board held a de novo hearing in this matter. It took testimony from numerous witnesses, assessed their credentials, weighed their opinions, and, based upon all the evidence before it, found the facts that support its judgment. We are an appellate court, not a fact-finding agency; we must defer to the Board when its findings are supported - even if the record contains contradictory evidence - and when its conclusions are rationally derived from its findings and based on a correct interpretation of the law. That is the case here.

III.

The third claim on appeal challenges the Board's conclusions pertaining to the three considerations labeled by small roman numerals under criterion 8. The Board ruled in the opponents' favor on all three considerations. We reach only the first and hold that the Board's conclusion was adequately supported.

The Board stated:

The Board concludes that the environmental and recreational loss to the public from the destruction and imperilment of the habitat is not outweighed by the economic, social, cultural, *recreational, or other benefit to the public* from the project. While the second homes will add to the tax base of the town, there is no evidence that the town needs the additional revenue. The Board is also not persuaded that the loss of the habitat will be outweighed by the social, cultural, or recreational benefit to the public from the additional 33 units in an area which is already predominated by second homes.

On the other hand, the loss to the public from the destruction and imperilment of the deer habitat is significant. The deeryard on the Southview property is part of the last remaining deeryard in a 10.7 square mile watershed. There is only one other area in the entire 280-320 acre deeryard that provides as high quality softwood cover as the 44-acre shelter on the Southview property. This proposed project would destroy ten acres of critical habitat and, through the secondary impacts of people living in the homes, imperil the remaining 34 acres. The existence of the deer in the area provides an opportunity to the public to hunt and to observe deer and provides the more intangible benefit of knowing that the deer exist. The loss of the deer in this area would be significant to the public who benefit from their existence.

Southview complains that the Board ignored evidence showing that second homes throughout the state contribute more to the economy of the state than does deer hunting. But this evidence simply was not relevant. The subcriterion requires only a comparison of the relative benefits and losses of the particular project. And that comparison must not be restricted to economic data only; the statute requires that the Board assess the less tangible effects, which

are not reducible to mathematical formulae. The Board properly undertook this task.

Affirmed.

APPENDIX D

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE:	Southview Associates by Raymond P. Perra, Esq. Weber, Perra & Wilson P.O. Box 558 Brattleboro, VT 05301	Findings of Fact and Conclusions of Law and Order Land Use Permit # 2W0634-EB

This decision pertains to an appeal filed on May 14, 1986 by Southview Associates from the decision of District #2 Environmental Commission, issued April 23, 1986. The Commission denied a permit for a 33-unit residential development on 88.5 acres off Pike Falls Road in Stratton and Jamaica, Vermont. The denial was based upon the Commission's finding that the project as proposed failed to meet the requirements of Criterion 8(a) (necessary wildlife habitat).

A prehearing conference was held on May 29, 1986 and a prehearing conference report was issued on June 3. A hearing was scheduled for July 16. At the request of the Applicant, the Board postponed the hearing until September, when it was further postponed, again at the request of the Applicant. A hearing was finally convened on November 19. Additional hearings were held on December 3, March 4, and April 22.

The following parties participated in the hearings:

Southview Associates by Raymond P. Perra, Esq.

Cersosimo Lumber Company by Ralph Foote, Esq.

Agency of Environmental Conservation by Robert Simpson, Esq.

Vermont Natural Resources Council by Eric Palola and Warner Shedd

On May 22 the State filed its proposed findings of fact and conclusions of law and on May 25 the Applicant filed its proposed findings of fact and conclusions of law. The Board conducted deliberative sessions on April 22, May 14, and June 24. On June 24 the Board concluded its review of the record and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearings. To the extent that the Board agrees with and found necessary any findings prepared by the parties, they are incorporated herein; otherwise, the requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The principal issue raised in this appeal is whether the proposed project meets the requirements of Criterion 8(a) (necessary wildlife habitat). The Commission's denial of a permit was based upon its finding that the project will significantly imperil necessary wildlife habitat and that the economic, social, cultural, recreational, and other benefits to the public from the development will not outweigh the economic, environmental, or recreational loss to the public from the imperilment of the habitat.

A threshold issue raised by the Applicant is whether the Board's interpretation of "necessary wildlife habitat" as articulated in Re: White Sands Realty Company, Land Use Permit #3WO630-1-EB, issued February 25, 1982, is correct. In that decision, the Board ruled that "necessary wildlife habitat" is habitat that is critical to the survival of the particular wildlife population which is dependent upon the identified habitat. The Applicant's position is that in the context of a deeryard, "necessary wildlife habitat" is habitat that is decisive to the entire population of the white-tailed deer species in the State. The State supports the Board's interpretation in White Sands.

With regard to the issue of whether the project meets the requirements of Criterion 8(a), the Applicant claims that although the project as proposed will be situated within a deeryard and will destroy approximately ten acres of winter cover, the development will not significantly imperil necessary wildlife habitat because the Applicant has proposed a mitigation plan that, if implemented, will produce a great deal more browse than is currently available for the deer. The Applicant claims that with the increased food supply, the property would be able to support at least the same number of deer that currently inhabit the area. The Applicant also believes that even if the project were to result in the limited loss of some deer, the economic benefit to the public in the form of revenues generated by the owners and occupants of the homes will outweigh any such loss, and that the Applicant's mitigation plan constitutes all feasible and reasonable means of preventing the imperilment of the habitat.

The State believes that the most significant factor for winter survival of deer is the quality and quantity of softwood cover available within a given area. Its position is that the loss of ten acres of softwood cover, coupled with the existence of a residential subdivision within the deeryard, would significantly imperil the necessary wildlife habitat so that the survival of the deer in the area would be threatened.

The State also believes that any minimal benefit the public would gain from an additional 33 vacation homes, in an area that already is dominated by second homes, is clearly outweighed by the effect the loss of deer due to the destruction or imperilment of their habitat would have on the public. The State also believes that the Applicant has not taken all reasonable and feasible means of preventing the imperilment of the deer habitat.

A secondary issue raised by the Applicant concerns Finding of Fact 1(D)(1) of the Commission's decision under Criterion 1. That finding indicated that the roadway to the project, which was

constructed under an earlier permit, has flooded several times in recent years. The Applicant apparently was not aware of the flooding problems and indicated it may present evidence on this issue. No other party had a position on this issue.

II. FINDINGS OF FACT

1. Southview proposes to build a 33-lot residential subdivision on 88 acres on the east side of Taylor Hill Road with 3,000 feet of roadway and 53 parking spaces. Approximately 21 acres will be directly developed. Seventy-eight acres are located in the Town of Stratton and ten acres are located in Jamaica. Access to the property is gained from an existing roadway off Taylor Hill Road at the southernmost part of the site.
2. The maximum number of units that can be built on this property is 33, based upon sewage disposal capacity.
3. The Town of Stratton contains 709 non-resident homes and 43 resident homes.
4. If the houses and lots are valued at $200,000 each, the project would generate $23,000 in tax revenue for the Town each year. The Board takes official notice that the tax rate in Stratton for 1987 is 33.5 cents.
5. A deeryard of approximately 280-320 acres encompasses the Southview property and is the only active deeryard in a 10.7 square mile area. Stratton once contained 600 acres of deeryard, much of which has been destroyed by development.
6. This deeryard contains two primary areas of good softwood cover. One of these is located on the Southview property. The mature softwood trees that constitute the critical deer wintering habitat cover approximately 44 acres of the Southview property.

7. Approximately 20 deer use this deeryard for winter habitat. The existing food supply in this deeryard is adequate to maintain the estimated 20 deer that winter there.
8. The softwood cover area on the Southview property is necessary to the deer that use it.
9. Ten acres of the critical deer wintering habitat will be destroyed by the development. The secondary impacts of the development will likely affect the deer in a larger area by causing them to avoid using portions of the habitat.
10. There is a general lack of winter habitat for deer in Stratton and the surrounding mountain towns.
11. A Wildlife Management Plan has been developed by the Applicant. The purpose of the plan is to mitigate the loss of the ten acres of critical softwood cover by increasing the food available for the deer and encouraging the growth of immature softwood to replace the cover lost to the development. The plan has three main components: (1) remove hardwoods in the remaining mature softwood cover areas to allow the softwood canopy to thicken, thereby creating better winter protection; (2) clear the existing hardwood overstory from the 13 acres of immature softwood to encourage more rapid growth of the softwood trees, to reach maturity in 10 to 15 years; and (3) clearcut the hardwood browse production areas on a rotational basis to provide browse in pockets scattered throughout the mature softwood cover.
12. New information is being discovered regarding the relative significance of the factors that affect winter survival. The most important factor is the deer's ability to limit the drain on its energy reserves. The importance of fat reserves for providing energy in the winter over the availability of browse is becoming more accepted by experts in the field of deer energetics.

13. Increasing the winter food supply in the deeryard only partially mitigates the adverse effect of this development on the deer that use the softwood shelter in the wintertime. It does not offset the loss of critical shelter because the availability of browse in the winter is not as important to the survival of the deer as protected softwood cover.
14. In the winter, deer's metabolic processes decrease, resulting in minimal energy expenditure. Good softwood cover provides shelter from the snow and wind and allows deer to conserve their energy reserves. Cover also retains solar heat and radiates less heat at night, so energy loss is minimized due to stable temperatures.
15. The total number of deer in a wintering area is limited by the size of the softwood cover.
16. Deer will use an isolated area with good softwood cover even if there is very little food available.
17. Energy demands are increased when deer are forced to winter in marginal areas due to the destruction of the good cover.
18. The rate at which deer are forced to use their fat reserves that they store during the late summer and early fall is critical to the survival of deer through the winter. Any increase in physical activity or heart rate due to human or pet activity would cause the deer to use their stored fat.
19. Types of human activity that cause stress to deer include operating automobiles, slamming car doors, radios playing outdoors, dogs barking or running free, people entering the deeryard on snowshoes or cross-country skis, and snowmobiles travelling in or near the deer area.
20. Studies have demonstrated that the heart rate of deer increases when there is human activity nearby. A 300-500 foot buffer zone between the deer and human activity is considered necessary to prevent disturbance of deer. There is a level of human

activity that deer will not tolerate; they will abandon a winter's habitat if such a level is reached.

21. Under severe snow conditions, deer are not able to move out of their cover area. Snow depth up to the deer's brisket causes severe restriction to deer movement. When deer are confined and unable to move about to obtain food, conservation of their fat reserves is critical to their survival. The increase in metabolic rate experienced when restricted deer are disturbed can cause death.
22. The reproduction rate of deer that are subjected to considerable stress decreases. Even if not all the deer leave the area, the ones that remain could have significantly lower reproduction rates.
23. It is likely that were this development built as proposed, the health of the deer that remain would decline and eventually all the deer would leave the area.
24. The Applicant's mitigation plan does not address the impact on the deer from human disturbance created by the development.
25. The development would have far less impact on the deer if it were located on other areas of the property.
26. The cumulative effect of development in the state is a threat to the entire deer herd.
27. The lots would be sold subject to restrictive covenants that would require that dogs be tied up or otherwise restrained at all times, prohibit the use of motorized vehicles in any area of the development, and require the Homeowners Association to hire a wildlife biologist to ensure that the recommendations in the Habitat Management Plan are implemented.
28. The Department of Fish and Wildlife has proposed to the Applicant several alternative plans for development in other

areas of this site that would create much less of an impact on the deer habitat.

29. In 1983 the Department of Fish and Wildlife advised the Applicant that its proposed development would significantly imperil the critical habitat on the property.

30. Southview Associates owns or controls no other property in the State.

31. The existing access road to the Southview Associates property experienced flooding on one occasion. The cause of the flooding was either a downstream obstruction which caused water to back up over the road, or debris blocking the culverts over which the road passes.

III. CONCLUSIONS OF LAW

A. Criterion 8(a) (Necessary wildlife habitat)

Under 10 V.S.A. § 6086(a)(8)(a), a permit will not be granted if any party opposing an application demonstrates that the project will destroy or imperil necessary wildlife habitat or any endangered species, and

> (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
>
> (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
>
> (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would

allow the development or subdivision to fulfill its intended purpose.

"Necessary wildlife habitat" is defined at 10 V.S.A. § 6001(12) as "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods."

The threshold issue that must be decided is whether the language "necessary wildlife habitat" in 10 V.S.A. § 6086(a) and defined in § 6001(12), as it applies to the white-tailed deer in Vermont, means habitat that is decisive to the survival of the entire population of deer in Vermont or decisive to the survival of the deer that are dependent upon the habitat. The Board in Re: White Sands Realty Company, Land Use Permit #3WO360-1-EB, issued February 25, 1982, interpreted this language and stated that a "necessary wildlife habitat" "need not be decisive to the survival of the entire population of a species of wildlife but must be critical only to the survival of a portion of the population which is dependent upon the identified habitat."

The Applicant urges the Board to reconsider its interpretation in White Sands and rule that Criterion 8(a) applies only to projects that would threaten a significant portion of a species of wildlife. The Applicant believes the phrase "significantly imperil" refers to the number of animals rather than the habitat and argues that the Legislature intended that any deer habitat can be destroyed or significantly imperiled as long as some deer remain.

The State contends that the Board's interpretation of "necessary wildlife habitat" in White Sands is reasonable and should be followed here. The State argues that any other interpretation of the statute would lead to an absurd result: only the last landowner in the state to develop a deeryard would be subject to the provisions of Criterion 8(a) with regard to deer winter habitat.

The Board believes its interpretation of "necessary wildlife habitat" in White Sands was correct. The statute would be rendered meaningless if it were interpreted to mean that only the last deeryard in the state would be subject to review under Criterion 8(a) so that the state deer herd would have to be on the verge of extinction before Criterion 8(a) would apply.[1] That could not have been the intent of the Legislature in a state where the health and size of the deer herd is an important enough issue to generate endless debate about whether the Legislature or the Fish and Wildlife Department should manage the deer herd and whether antlerless deer hunting should be allowed. The survival of the deer throughout the state is clearly of state-wide public concern and a proper subject for regulation under Act 250.

Furthermore, Criterion 8(a) addressed both "necessary wildlife habitat" and "endangered species" as discrete subjects that may be protected under the statute. Were "necessary wildlife habitat" interpreted as the Applicant suggests, and the only wildlife habitat that could be considered is that which is necessary to the survival of an endangered species, the reference to "endangered species" would be redundant. The Board assumes that the legislature intended these as separate entities, especially since each is separately defined in the statute. See 10 V.S.A. § 6001(5) and (12). The Board therefore concludes that the appropriate consideration in this case is whether the deeryard on the Southview property is decisive to the survival of the deer that use it and, if so, whether the deeryard will be destroyed or significantly imperiled.

The Board concludes that the development as proposed by Southview, consisting of 33 houses, 3,000 feet of road, and 53

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[1] An accepted rule of statutory construction is that a statute should not be interpreted so that it has absurd consequences. See In re Judy Ann's Inc., 143 Vt. 228 (1983).

parking spaces, will destroy and significantly imperil necessary wildlife habitat. The existence of a deeryard on this property is undisputed. The property, containing 44 acres of critical softwood cover, is part of a larger deeryard of 280-320 acres. This deeryard is the only remaining deeryard in the Stratton area; approximately 300 acres of deeryard have already been eliminated by development. This development would destroy 10 of those acres. In addition, a much larger area would be affected by the secondary impacts due to the increase in the level of human and pet activity in and around the remaining deeryard. The approximately 20 deer that use the deeryard for shelter in the wintertime are dependent upon the softwood cover for their survival.

It is not reasonable to assume that the existence of covenants will ensure that the deer will not be disturbed by human and domestic animal activity. Compliance with or even knowledge of the covenants would be difficult to guarantee, given the turnover of occupancy expected in vacation homes through resale, rental use, or use by the owners' friends and relatives.

As a result of the development, it is likely that there will be a loss of deer in this habitat. It is likely that the deer will abandon the remaining cover altogether and those that remain will be less likely to survive due to the high potential of stress created by wintertime noise and activity from people, vehicles, and pets. Without the use of the critical softwood cover that currently exists on the Southview property, the deer are likely to be required to seek shelter in inferior cover that may provide inadequate protection from winter snow and winds. Without adequate winter shelter, the deer are more likely to use up their fat reserves and their ability to survive the winter is jeopardized. Any deer that do survive are likely to be weakened and may have lower reproduction rates.

The Board concludes that the environmental and recreational loss to the public from the destruction and imperilment of the

habitat is not outweighed by the economic, social, cultural, recreational, or other benefit to the public from the project. While the second homes will add to the tax base of the town, there is no evidence that the town needs the additional revenue. The Board is also not persuaded that the loss of the habitat will be outweighed by any social, cultural, or recreational benefit to the public from the additional 33 units in an area which is already predominated by second homes.

On the other hand, the loss to the public from the destruction and imperilment of the deer habitat is significant. The deeryard on the Southview property is part of the last remaining deeryard in a 10.7 square mile watershed. There is only one other area in the entire 280-320 acre deeryard that provides as high quality softwood cover as the 44-acre shelter on the Southview property. This proposed project would destroy ten acres of critical habitat and, through the secondary impacts of people living in the homes, imperil the remaining 34 acres. The existence of the deer in this area provides an opportunity to the public to hunt and to observe deer and provides the more intangible benefit of knowing that the deer exist. The loss of the deer in this area would be significant to the public who benefit from their existence.

The Board wishes to emphasize the factors that must be considered under the statute. The Applicant testified to the economics of the project with regard to his investment. The economic benefit or loss to the applicant, however, is not one of the factors in Criterion 8(a). The proper consideration, as stated clearly in the statute, is a comparison of benefits (including economic) of the project to the public with the loss to the public from the destruction of the habitat. The Board must therefore disregard any testimony regarding the economic impact upon the applicant in determining whether a project meets the requirements of Criterion 8(a).

The Board also concludes that the Applicant has not applied all feasible and reasonable means of preventing or lessening the destruction and imperilment of the deer habitat. The Board has found that the wildlife habitat plan proposed by the Applicant is not adequate to mitigate the loss of the critical softwood cover because the increase in food supply does not substitute for the loss of the high quality cover. Moreover, the Applicant's mitigation plan did not take into account the secondary effects of the development on the rest of the deeryard from the presence of people.

The State testified that there are several alternative sites that could be developed with much less impact on the deeryard. The Board is not persuaded that the Applicant has thoroughly investigated the possibility of less intensive development in other areas of the site. The Applicant testified that the sites identified by the State would not accommodate the 33-lot development as proposed. The Applicant further testified that a smaller project would not be economically viable because it would not provide the Applicant with a reasonable return on the large investment it made in anticipation of receiving approval to build the maximum possible number of units on the property. The Board notes that an applicant's investment in anticipation of receiving Act 250 approval for a project is not relevant to the question of compliance with the criteria of Act 250. There is no language in Criterion 8(a) that suggests that the legislature intended that an applicant's previous investment in a property should bear on whether a permit should be issues.

B. Criterion 1(E)

The Board has found that the access road to the Southview Associates property experienced flooding and that the cause was either a downstream obstruction or debris blocking the culverts. If the Board were issuing a permit, it would require that the cause of the flooding be determined and corrected.

ORDER

Application #2W0364-EB is hereby denied.

Dated at Montpelier, Vermont this 30th day of June, 1987.

ENVIRONMENTALBOARD

/s/ Darby Bradley
Darby Bradley
Ferdinand Bongartz
Elizabeth Courtney
Jan S. Eastman
Samuel Lloyd
Roger N. Miller

Member Dissenting:
Dwight E. Burnham[2]

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[2] Dissenting Opinion of Member Burnham. At the rate farms are going out of business, the state will not have to worry about the availability of browse and cover for deer. It will not take long for the fields currently in agricultural production to grow up to sprout land and forest land. Deer are in no danger in Vermont.

APPENDIX E

Relevant Sections of the State of Vermont District Environmental Commission's Findings of Fact and Conclusions of Law[1]

RE: SOUTHVIEW ASSOCIATES
Land Use Permit Application #2W0634

8A. Necessary Wildlife Habitat:

(1) The District Environmental Commission, in making Findings of Fact for this Criterion, has relied upon the testimony of witnesses for the State and the applicant as well as exhibits provided by both parties. Critical testimony was provided by the following witness:

Witnesses for the State:

(a) James DiStefano, District Wildlife Biologist in the Department's North Springfield office. DiStefano is a certified wildlife biologist with nearly 12 years of experience. While employed as a wildlife biologist for the State of Maryland, DiStefano's duties not only included management of a 15,000 acre deer habitat in this district (5 years), but also work on describing and inventorying deer wintering areas on the Appalachian Plateau in western Maryland (2 years). Since working in Vermont, DiStefano has spent approximately 50 per cent of his time with the Department assessing the impact of development on animal habitats (including deeryards).

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[1] The text of the relevant sections of the District Environmental Commission's Findings of Fact and Conclusions of Law are reproduced verbatim in this Appendix; the numerous typographical and structural errors are as in the original Findings of Fact and Conclusions of Law.

(b) Dr. William Mautz, a biologist and professor at the University of New Hampshire, has spent 20 years studying deer. Much of his research work during that period has centered on wildlife habitat. Professor Mautz has published numerous articles on deer nutrition and physiology as well as wildlife habitat. He also teaches a course on the subjects at the University of New Hampshire.

(c) Lawrence Garland is the Department's Assistant Wildlife Director. He graduated from Cornell University with a degree in wildlife biology and has studied deer for 22 years. He is a certified Wildlife Biologist. Some 16 of these years were spent as the State's deer project leader. He has examined nearly 1,000 deeryards in the State of Vermont. As is the case with Dr. Mautz, Garland has devoted much of his professional life to the study of deer.

(d) Dr. Alphone Gilbert, Associate Professor in Resource Economics, University of Vermont. Dr. Gilbert teaches a course in Natural Area Evaluation.

Witnesses for the Applicant:

(a) Jeffrey Wallin is a certified Wildlife Biologist with 14 years of experience. Wallin worked for the Department for 12 years before leaving to start a consulting business. He served as a district biologist and worked as a project leader for the State's wild turkey project. He testified that during his 12 years with the Department, he spent 20 per cent of his time on deer.

(b) George Donovan, research analyst with the Vermont Agency of Development and Community Affairs.

2. In making a decision under this Criterion, the District Environmental Commission must determine the following:

a) If the property involved in the proposed development is "necessary wildlife habitat."

b) If the development will destroy or significantly imperil necessary wildlife habitat.

c) If the District Environmental Commission finds affirmatively under #a and #b above, the Permit will not be granted if any of the following are demonstrated by a party opposing the application:

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) A reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

I. FINDINGS OF FACT:

1. "Necessary wildlife habitat" as defined under 10 V.S.A., Section 6001(12) means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migrating periods.

2. Necessary wildlife habitat is further defined by the Environmental Board in re: White Sands Realty Company Land Use Permit #3W0360-1-EB Conclusions of Law dated February 25, 1982. In this case the Board concluded, "necessary wildlife habitat as defined in 10 V.S.A., Section 6001(12) need not be decisive to the survival of the entire population of a species of wildlife but must be

critical only to the survival of a portion of the population which is dependent upon the identified habitat."

3. All parties agree that the proposed development is in a deeryard. Testimony - Wallin.
4. The entire 88-acre parcel is part of a continuous deer wintering area estimated to total 280 acres. Exhibits #21 and #24.
5. The deeryard involved is the only active deeryard serving a 10.7 square mile area. The proposed development, which involves 88 acres, accounts for nearly 30 per cent of the approximately 280 acres in the yard. It is "prime winter deer habitat." Testimony DiStefano and Garland.
6. There is a general lack of winter habitat for deer in Stratton and the surrounding mountain towns. Garland, June 12, 1985.
7. The 280-acre deeryard which will be affected by the proposed development provides a winter habitat for approximately 50 deer. This is approximately 20 per cent of the estimated 240 deer that enter winter in Stratton. DiStefano, May 14, 1985; Garland, June 12, 1985).
8. The deeryard which will be affected by this project has already shrunk by some 50 per cent. It once contained some 600 acres and stretched up to the Stratton Corporation Golf Course and "High Meadows." Testimony DiStefano.
9. The proposed development would be located in and around a concentration of softwood cover near the middle of the remaining 280-acre deeryard. Testimony and Exhibit #24.

10. Characteristics of the deeryard in question:
    a. As indicated above, the deeryard is composed of approximately 280 acres. (Exhibit #21)
    b. There are two primary concentrations of good softwood cover for deer. The best area of softwood cover is located near the middle of the yard; the other in the southern end of the yard. Testimony DiStefano.
    c. This deeryard provides better softwood cover that the average deeryard in mountain areas. Garland, June 12, 1985. Testimony Garland.
    d. Food supply in areas outside the two primary concentrations of good cover averages around 14-15 lbs. of browse per acre. Testimony DiStefano.
    e. The food supply in the deeryard as a whole is adequate to maintain the approximately 50 deer that use the yard and already exceeds the amount projected in the developer's improvement plan (11 lbs. per acre). Testimony Garland.
    f. This deeryard is an "ideal" wintering area for deer. Testimony DiStefano.
11. The deeryard in question is "necessary for the survival" of the deer it serves." Testimony Dr. Mautz, Garland and DiStefano.
12. A deeryard's primary value is in preventing energy drain.
    a. Winter food is not the most significant source of a deer's energy in the winter. The key source of a wintering deer's energy is the fat reserve it has entered the winter with. Testimony Mautz.

b. Normally, a deer's ability to limit drains on its energy reserves is the most important factor in determining whether it survives the winter. Testimony Mautz.

c. Ideal deeryards, such as the one at issue here, are havens which provide the best conditions for minimizing energy drain. Testimony Mautz.

13. The most vital portions of a deeryard are those areas where there is a concentration of softwood cover. Those areas are most important because they enable deer to conserve energy in the following ways:

a. The cover shields deer from human disturbances or disruption.

b. Snow depths in the cover are much lower because the boughs of the trees collect the snow. The lower snow depths in turn enable deer to get around with less effort than they do outside the cover.

c. The cover shields deer from cold winds.

d. This cover retains solar heat and radiates less heat at night. The stable temperature allows deer to minimize energy loss. Testimony Mautz and Exhibit #28.

II. SIGNIFICANT IMPERILMENT OF THE HABITAT

1. The proposed development will "significantly imperil" this necessary wildlife habitat. Testimony Mautz, Garland and DiStefano.

2. The proposed development here will be located in one of two areas of concentrated softwood cover in the yard. Testimony DiStefano.

a) During the most stressful winter weather conditions, the estimated 50 deer using this yard are most likely to be either in cover near the middle of the yard where the development is proposed or in the cover in the southern end of the yard. Testimony DiStefano.

b) The area where the development is proposed provides the best cover in the yard. As many as 20-30 deer could use this cover during times in the winter. Testimony DiStefano.

3. The project will remove 10 acres of critical softwood cover. Exhibit #2.

4. The project will involve the development of 23 acres of the 88-acre parcel (21 acres of housing development and 2 acres of existing access road. There will be 33 detached homes, 53 parking spaces, 3000 feet of road within or in the proximity to the remainder of the most critical portions of the deeryard. Testimony Garland and Exhibit #2.

5. Human disturbance represents a significant threat to deer from energy loss.

a) A deer enters the winter with a finite energy reserve. If a deer is startled by human activity or the dogs and machines that accompany humans, it will use energy that may not be replaced by the winter food supply regardless of how abundant that supply is.

b) A deer that is startled into standing may use 50 per cent more energy than when it is lying down.

c) Under some circumstances, a disturbance that causes a deer to stand just one additional time may mean that the deer will not have sufficient energy to live until spring. Testimony Mautz.

6. The proposed development is a second home development in a ski area. It will be used most heavily in the wintertime at the very time that the deer would use the cover. There will be significant human activity in this development during the winter. In addition to people, automobiles, and in all likelihood, dogs. Testimony DiStefano, Garland, Mautz. Exhibit #2.
7. The human activity described above will result in deer abandoning the 88-acre section (including the best critical cover area) which the developer owns. It will also result in a net loss of deer in the town. Testimony Garland.

II. The Economic Social, Cultural, Recreational or Other Benefit to the Public

1. The economic value of wildlife habitat has not been set in the market place. Nevertheless, resource economists have devised a way of expressing the value of such habitat in economic terms. Testimony Gilbert.
2. The deer yard has a "Use Value" as a source for hunting as well as a site to observe and photograph deer. The deeryard also has a "Non Use" or "Preservation" Value, which is composed, in turn of "Option", "Existence" and "Bequest" value. That is, people are willing to pay to insure that they will have the option to use unique areas in the future (Option Value). People are likewise willing to pay to know that such unique areas will be protected during their lifetime (Existence Value) and they are willing to pay for the opportunity to bestow such areas on future generations (Bequest Value). Testimony Gilbert. Exhibit #67.
3. The deeryard in question has a capitalized recreational value for hunting alone in excess of $3,100 per acre. Testimony Gilbert.

(a) The capitalized value of an acre of Windham County deeryard referred to above was derived from a carefully prepared study conducted by Dr. Gilbert for 1980. It was the third such study conducted by Dr. Gilbert.

(b) Dr. Gilbert prepared a questionnaire on expenditures for hunting and fishing of some 8,400 people selected to provide a representative sample of those purchasing hunting licenses.

(c) There was a 46.3 usable response to the questionnaire, which asked for detailed information on expenditures made for hunting, fishing and trapping.

(d) Based on the information provided through the questionnaires as well as figures as to the deeryard acreage in Windham County, Dr. Gilbert was able to set a capitalized value for an acre of deeryard in Windham County at slightly over $3,1000.

(e) This figure represents only a portion of the yard's "use" value. Testimony Gilbert.

4. The "preservation value" or "non-use value" would, in economic terms, at least equal the "use value" of the project. Testimony Gilbert.

5. Studies have shown that for every dollar the public is willing to spend to use wilderness habitat, they are willing to spend another dollar for preservation of the environmental value of wilderness. Testimony Gilbert.

Conclusions of Law - Criterion 8A - Necessary Wildlife Habitat

1. The project area is "necessary wildlife habitat" as contemplated under 10 V.S.A.(8)(A).

The District Environmental Commission concludes the entire 88-acre parcel is part of a continuous deer wintering area estimated 280 acres. Deer wintering areas, such as this one, are necessary wildlife habitat as they are decisive to the survival of the deer that they serve. The applicant has argued that wildlife habitat is not "necessary" habitat unless it is decisive to the survival of the deer that use it, but to the species -- white tail deer. Testimony. The Commission rejects this argument, as did the Environmental Board in re: White Sands Realty Company Land Use Permit #3W0360-1-EB Conclusions of Law dated February 25, 1982. In this case the Board concluded, "necessary wildlife habitat" as defined in 10 V.S.A., Section 6001(12) need not be decisive to the survival of the entire population of a species of wildlife but must be critical only to the survival of a portion of the population which is dependent upon the identified habitat."

The most important value of deer wintering areas is the protection they afford deer from energy drain. A deer's ability to limit drains on its energy reserves is the most Findings of Fact and Conclusions

important factor in its survival of the winter. Wintering areas contain concentrations of softwood cover which enable deer to conserve energy in the following ways:

a) The cover provides protection from disturbance
b) Snow depths are lower and this enables the deer to move
c) Cover provides protection from cold winds which cause heat loss.
d) Cover retains solar heat and radiates less heat at night thus providing a more stable temperature so deer can minimize heat loss.

The project area contains two concentrations of better than average softwood cover. The area where the development is proposed contains the best cover in the 280 acre deeryard. Without this critical undisturbed softwood cover, a portion of the deer utilizing the deeryard will be lost.

2. The proposed development will significantly imperil the necessary wildlife habitat.

The applicant's proposal would involve the development of 23 acres of the 88-acre parcel. (21 acres of housing development and 2 acres of existing access road.) Ten acres of the proposed development is located in one of two areas on the site with concentrated softwoods which provide the best cover in the yard. The project would destroy these 10 acres of necessary wildlife habitat. Approximately 34 acres of softwood would not be developed.

The applicant argues that the destruction of the 10 acres of softwoods and the overall impact of the development can be mitigated through implementation of a habitat management plan and covenants which restrict tree cutting, additional development, control dogs and prohibit the use of all-terrain vehicles. The applicant emphasizes the development of 10 acres of mature softwood cover represents only 4% of the 280 acre continuous mature softwood deer wintering area and that overall 65 of the 88-acre parcel will not be developed.

The applicant contends the project, although eliminating 10 acres of softwood cover, can equal or increase the area's carrying capacity through habitat manipulation techniques. The applicant's habitat improvement plan focuses on the following:

a) Enhance the vigor and canopy closure of the 34 acres of softwood shelter

b) creation of future softwood shelter through release of immature softwoods, and

c) management of 18 acres for browse.

Exhibit #11 and Testimony.

The applicant states the single most limiting factor (short range) affecting Vermont's deer herd is the lack of browse in and around winter cover. Exhibit #2. The project area has a comparatively low amount of available browse with only 3 lbs. per acre. The applicant's habitat management plan would increase the availability of browse to an average of 11 lbs. per acre throughout the site. Testimony.

The Commission concludes, that although a habitat manipulation program would undoubtedly be of value, food availability is not the limiting factor to deer survivability in the winter. The most significant factors that determine deer winter survivability are the amount of fat reserve the deer has entering the winter and circumstances which prevent energy drain. Testimony. Although food supply in the 88 acres project is estimated to provide only 3 lbs. of available browse per acre, outside of the two primary concentrations of good cover, browse averages around 14-15 lbs per acre. The food supply in the deer yard as a whole is adequate to maintain the approximately 50 deer that use the yard and already exceeds the 11 lbs. per acre projected in the developer's improvement plan. Testimony.

The presence of excellent mature softwood cover, more than adequate browse throughout the yard for deer to use to build up fat supplies and use during mild winter conditions, and the lack of human activity and other disturbances make the project deeryard ideal. The removal of 10 acres of softwood cover can not be compensated by the applicant's proposed habitat manipulation plan. Although the plan calls for creation of 13 acres of softwood shelter, a softwood seedling takes 20-40 years before it can afford deer required shelter. Testimony and Exhibit #2.

In addition to removing ten acres of mature softwood cover, the disturbance generated by the project will cause energy drain and diminish the deer's changes for winter survival. A deer's basic winter survival mechanisms are the storing of fat deposits to provide energy during winter months and the significant lowering of metabolic rate. Testimony and Exhibit #21. Disturbance significantly imperils a deer's ability to survive. Studies have shown a deer expends 50% more energy to stand than lying down. Testimony. During severe weather conditions, a deer's best strategy is to stay bedded down. Deer enter the winter with a finite energy supply that may not be replaced by winter food supply, regardless of how abundant the supply. Studies of captive deer have shown winter food does not have great energy value and deer digest only 20% of the food. The disturbance from people, dogs, sounds from automobiles, even the cost of mental alertness in a developed setting can cause energy drains leading to mortality.

The Commission finds the project, with removal of 10 acres of mature softwood cover, and creates 33 homes, 53 parking spaces and 3,000 feet of road within or in proximity to the critical portions of the deeryard will destroy 10 acres of necessary wildlife habitat and significantly imperil the balance of the 88 acres of necessary wildlife habitat. The loss of softwood shelter and disturbance will either cause deer to abandon the area or sufficiently stress deer, depleting their energy supply to cause mortality.

3. The economic, social, cultural, recreational or other benefits to the public from the development will not outweigh the economic, environmental or recreational loss to the public from the destruction or imperilment of the habitat.

The project area, consisting of 88 acres of prime winter deer habitat is the only active deeryard serving a 10.7 square mile area. Additionally, there is a general lack of winter habitat in Stratton and surrounding mountain towns. In contrast, there is <u>no shortage</u> of

second home developments in the region, and more importantly, there is no shortage of appropriate sites to construct more such developments.

The deeryard which will be affected by this project has already shrunk by some 50 per cent. It once contained 600 acres and stretched up to the Stratton Golf Course and High Meadows Subdivision. Testimony DiStefano.

Deeryards provide significant economic benefits to the public through recreational hunting as shown by studies on expenditures by hunters. Testimony Gilbert. Although the economic contribution of Vermont second homeowners exceeds that of deer hunters (Testimony Donovan), the Statute requires the Commission to also weigh the social, cultural and recreational benefits of the habitat and the proposed development. The project area, which supports white-tailed deer and various other wildlife species, is an important environmental, social, recreational and cultural resource to the citizens of Windham County. Deer wintering areas provide opportunities not only for hunting but for observing and photographing deer, hiking and outdoor educational experiences for children and adults to learn and appreciate the environment. The preservation of this deer wintering area for the present and future protection of the white-tailed deer and other wildlife as well as for the economic, social, cultural, recreational, environmental and educational benefits for the public outweighs the benefits of an additional second home development in Stratton.

Inasmuch as the Commission has made positive Findings that the development will significantly imperil necessary wildlife habitat and the economic, social, cultural, recreational or other benefits to the public from the development will not outweigh the economic, environmental or recreational loss to the public from the imperilment of the habitat, it is not necessary to consider subsections (ii) and (iii) of Criterion 8(a).

* * *

CONCLUSIONS OF LAW:

Based upon the foregoing Findings of Fact, it is the conclusion of this District Environmental Commission that the project described in the application referred to above, if completed and maintained in conformance with all of the terms and conditions of that application, and of Land Use Permit #2W0634 will cause or result in a detriment to public health, safety or general welfare under the criterion 8A Necessary Wildlife Habitat as described in 10 V.S.A., Section 6086(a).

COMMISSION ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #2W0634 is hereby denied.

Dated at North Springfield, Vermont this 23rd day of April, 1986.

By: /s/Frederick Pope, Jr.
Frederick Pope, Jr., Chairman
District II Environmental Commission
Environmental Board

Others Participating in this Decision:
Philip L. Blanchard & Verne Howe

/s/April D. Hensel
April Hensel, District Coordinator
Environmental Board

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT
Civil No. 91-200

SOUTHVIEW ASSOCIATES, LTD., SOUTHVIEW AT STRATTON PARTNERS

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD: FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Southview Associates, Ltd. and Southview at Stratton Partners, (hereinafter collectively referred to as Southview), through its attorneys Abell, Kenlan, Schwiebert & Hall, P.C., seeks declaratory and preliminary and permanent injunctive relief and complains against the defendants as follows:

JURISDICTION

1. This action is brought by Southview for declaratory and injunctive relief pursuant to the provisions of 42 U.S.C. § 1983, pursuant to the due process and equal protection clauses embodied in the Fifth and Fourteenth amendments of the United States Constitution and pursuant to 28 U.S.C. §§ 2201 and 2202 seeking

declaratory and injunctive relief to declare plaintiff's rights to use its property and to enjoin defendants from impermissibly and unconstitutionally precluding plaintiff from using its property for the purposes of a residential subdivision.

2. The Court has jurisdiction in this action under the provisions of 28 U.S.C. §§ 1331, 1332 and 1343 in that the action arises under the due process and equal protection provisions of the Fifth and Fourteenth Amendments of the United States Constitution and under the just compensation provisions of the Fifth Amendment as incorporated in and applied to the states by the Fourteenth Amendment of the United States Constitution; and in that the named parties are citizens of different states and the amount in controversy exceeds $50,000.00 exclusive of interest and costs.

THE PARTIES

3. Plaintiff Southview at Stratton Partners is a limited partnership established under the laws of the State of Connecticut and is the fee simple owner of approximately 88 acres located in the Towns of Stratton and Jamaica, County of Windham in the State of Vermont (hereinafter "the Property"); a copy of the deed of the Property is attached hereto as Exhibit A. Plaintiff Southview Associates, Ltd. is a limited partnership established under the laws of the State of Vermont and is the developer of said property.

4. Defendants Ferdinand Bongartz, Lixi Fortna, Arthur Gibb, Samuel Lloyd, William Martinez, Charles Storrow, and Steve Wright and Chairperson Elizabeth Courtney are the present members of the Environmental Board (hereinafter the "Board"). The Environmental Board has been created by the Legislature of the State of Vermont for the purpose of promulgating, administering and enforcing Vermont's Land Use and Development Plans Act, 10 V.S.A. § 6001 et seq (Act 250), and has on-going jurisdiction and control over plaintiff's past and present efforts to develop the Property.

BACKGROUND

5. During the Winter of 1981-1982 and the Spring of 1982, Southview, through its general partners, John H. Lese, Frank Webber and Fritz Doepke, investigated the availability of sites for possible residential development in the Stratton, Vermont, area, with particular emphasis on sites close to the Stratton ski area which would be suitable for subdivision and construction of single family dwellings.

6. In the Winter of 1982, Southview became aware that Cersosimo Lumber Company, Inc. (Cersosimo) was offering for sale a parcel of land located within the towns of Stratton and Jamaica, Vermont containing 88.5 acres (the Property), and entered into negotiations to purchase the Property from Cersosimo.

7. Southview's purpose in acquiring the Property was to develop a planned residential subdivision, consisting of 78 building lots of an average of one acre each, approximately 1,500 feet of roads to serve the lots, and a community sewage collection, treatment and disposal system, (hereinafter the "Preliminary Development Plan") to be located on approximately 78.5 acres of the Property located in Stratton and 10 acres in Jamaica.

8. Prior to executing a purchase and sale contract for the purchase of the Property, Southview, evaluated the Property to determine its suitability for the Preliminary Development Plan and to determine whether there appeared to be any physical characteristics of the Property or its surrounding area which would preclude the issuance of necessary local and State land use and development permits, including zoning permits and so-called Act 250 permits for the Preliminary Development Plan.

9. As a result of its investigations, Southview determined that the predominant land use pattern in the area in which the Property is located is characterized by second home residential subdivisions essentially similar to the Preliminary Development Plan. A number

of those similar residential subdivisions are on lands essentially identical in character to the Property and were approved by the District II Environmental Commission (hereinafter the Commission) under Act 250.

10. The Zoning Regulations and the Town Plan of the Towns of Stratton and Jamaica and the Windham Regional Plan, in effect at the time Southview entered into the purchase and sale agreement for the Property, and at all times relevant to this Complaint, designated the Property as suitable for the Preliminary Development Plan. (Exhibit B, Page 6, Section 220; Exhibit C, Page 19-20, Finding 10).

11. On March 11, 1982, after having satisfied itself that there were no apparent impediments to the Preliminary Development Plan, Southview, through John Lese, entered into a Purchase and Sale Agreement with Cersosimo to purchase the Property for a purchase price of $225,000.00. (Purchase and Sale Agreement - Exhibit D).

12. Following execution of the Purchase and Sale Agreement, Southview employed Southern Vermont Engineering Company (Southern Vermont) as a consultant to assist and advise Southview in the conduct of an in-depth "due diligence" evaluation of the property and development of a preliminary land use plan to insure that the Preliminary Development Plan for the Property would comply with state and local land use laws and regulations.

13. During the course of its "due diligence" evaluation, Southern Vermont advised Southview that, among other permit requirements, Southview would have to satisfy the provisions of 10 V.S.A. § 6086(8)(a), referred to in this Complaint as Criterion 8, which sets forth the following requirements:

> (8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(a) **Necessary wildlife habitat and endangered species**. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economics, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

14. 10 V.S.A. § 6001(12) defines the term "Necessary wildlife habitat", as that term is used in Criterion 8, as:

..concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period of its life including breeding and migratory periods.

15. At all times relevant to this Complaint, the Vermont Department of Fish and Wildlife (hereinafter the Department) has, as part of the usual and customary conduct of its duties, maintained and made available to the public (including Act 250 applicants) information, including Deer Yard Maps, purporting to designate the existence and location of significant deer wintering areas, (deer yards) on public and private property in Vermont.

16. At all times relevant to this Complaint, the Department knew that applicants and their representatives would rely upon the Deer Yard Maps to determine whether a particular property, locale or proposed development included or involved any deer yards.

17. In providing Deer Yard Maps to Act 250 applicants and their representatives, the Department knew that Act 250 applicants, including the Plaintiff in this case, would rely upon the Maps in making decisions with respect to the purchase of property, the planning of the development of the property, and the preparation and presentation of Act 250 applications.

18. At all times relevant to this Complaint, the Department knew and intended that District Environmental Commissions, including the District II Environmental Commission before whom Southview was required to apply for its permit, relied almost exclusively upon opinion and testimony by the Department to determine whether property which is the subject of an Act 250 Application includes or involves deer yards, as identified by the Department in its Deer Yard Maps, and whether such deer yards would be impaired or imperiled by proposed development.

19. Neither the designation of deer yards by the Department, nor the review of particular private lands to determine the presence of deer yards or other necessary wildlife habitat, are undertaken by the Department pursuant to any law, rule or regulation, or the requirements of the Administrative Procedures Act, but are ad hoc determinations by various agents of the Department, without prior notice to the property owner, or opportunity afforded to the public or the property owner to have knowledge of, be heard on or appeal the designation of their property as a Deer Yard on the Deer Yard Maps.

20. The Deer Yard Maps prepared and provided by the Department for the Towns of Stratton and Jamaica at the time Southview undertook its "due diligence" investigation of the

Property, prepared its Preliminary Development Plan, and closed on the purchase of the Property, indicate that the Department had made extensive studies of what the Department believed to be the significant deer habitats in the Stratton and Jamaica areas. Copies of the Deer Yard Maps were made available to the public by the Department.

21. During the Summer of 1982, and prior to its purchase of the Property, Southview instructed Southern Vermont to investigate the Property to determine whether the Property contained Necessary Wildlife Habitat as defined under Criterion 8A.

22. Following the instructions of Southview, Southern Vermont inspected the Department's Deer Yard Maps (Exhibit E) to enable it to determine whether the Department had determined that the property contained any necessary wildlife habitat. The Maps provided by the Department disclosed that no deer yards were located on the Property.

23. On or about June 3, 1982, based on Southern Vermont's "due diligence" review of the Property and the confirmation by the Deer Yard Maps provided by the Department that no deer yard was located on the Property, Southview purchased the Property from Cersosimo. As part consideration for the Property, Southview executed and delivered to Cersosimo a promissory note in the amount of $125,000, secured by a first mortgage on the Property (collectively, the Cersosimo Mortgage).

24. Following the purchase of the Property, during the Summer and Fall of 1982 and the Winter and Spring of 1983, Southview continued to pursue and refine its Preliminary Development Plan for the Property, based upon Southview's "due diligence" site investigation, applicable provisions of local Zoning Regulations, Regional and municipal land use plans, and other relevant information, such as the Deer Yard Maps, provided to Southview by the Department and the Agency of Natural Resources. In the process

of developing and refining the Preliminary Development Plan, Southview made substantial expenditures for professional services and related planning, engineering and design costs.

25. In the Spring of 1983, as part of the investigation of the Property for suitable sewage disposal sites, P. Howard Flanders, Chief of the Technical Review Section of the Vermont Agency of Natural Resources (hereinafter the Agency), advised Southview and the Department that, in his opinion, the Property contained several deer yards. This was the first notice which Southview received that the Department or the Agency would take the position that the Property contained Deer Yards. A letter from the Department thereafter notified Southview through Southern Vermont that virtually all of the project was within a deer yard (Exhibit F).

26. In a letter to Southview in 1983, the Department and the Agency advised Southview that, upon further investigation by the Agency, the Property could not be developed for any purpose, and that the Agency would oppose any development of the Property (Exhibit G). This information also was communicated to Southview orally by the Agency.

27. Between the Fall of 1983 and the Winter of 1984-1985, in an effort to mitigate, as much as possible, the impacts which the Department maintained the Proposed Development would impose upon what the Department had identified as deer yards on the Property, to comply with various other regulations and conditions of the property and to salvage some value from its investment in the Property and the costs of planning and engineering for the Preliminary Development Plan, Southview revised its development plan to provide for only 33 dwellings with related infrastructure and improvements, clustered as much as possible away from the deer yards identified by the Department.

28. Both the 78-lot Preliminary Development Plan and the 33 lot Proposed Development Plan for the Property prepared by

Southview are consistent with and substantially the same as the uses of property generally permissible and occurring throughout the general geographic area in which the Property is located and previously approved by both the Agency, the Department, the Commission and the Board, and in no way constitute a nuisance or a threat to public health, safety and welfare.

29. In February of 1985, Southview submitted to the Commission Application No. 2WO634 (the Application) for a State Land Use Permit for the Proposed Development (Exhibit H).

30. During the Commission's hearings held between February 1985 and April 1986, the Department, through oral and written testimony and evidence presented to the Commission, maintained that, in its opinion, the Project included ten acres of deer yard and provided habitat for between six and ten deer (Exhibit B).

31. Throughout the proceedings before the Commission and the Board, the evidence and testimony submitted by both Southview and the Department supported the conclusion that the deer yard area identified by the Department involved a total of approximately 280 acres, of which 44 Acres are located within the Property and provide habitat for fewer than 10 deer; of the 44 acres of purported deer yard located within the Property, approximately 10 acres are involved in the Proposed Development.

32. The white tailed deer which the State agencies seek to protect through the objections to the Project are neither endangered nor threatened species in the State of Vermont; in fact, the State, each Fall, encourages the slaughter of an unlimited number of male deer (and, depending on the periodic vagaries of State game management "policy", an unlimited number of male deer, female deer and fawns) for the economic benefit of the State and the satisfaction of both in-state and out-of-state hunters.

33. Based exclusively on the information and evidence provided by the Department, the Commission denied Southview's

Act 250 permit application (Exhibit B). The Commission found that the proposed development satisfied all of the Act 250 Criteria except Criterion 8A with respect to the deer habitat identified by the Department, and based its denial solely on Criterion 8A.

34. Both prior to and after its denial of Southview's Act 250 Permit for the Proposed Development, the Commission, with the concurrence of the Department, has consistently permitted other developments substantially similar to the Proposed Development, located in the immediate vicinity of the Proposed Development, which have destroyed or imperiled Deer Yards identified by the Department.

35. A timely appeal of the Commission's ruling was taken by Southview to the Vermont Environmental Board (the Board) on or about May 14, 1986.

36. On June 30, 1987, the defendants denied Southview's appeal of the denial by the Commission of an Act 250 permit for the Proposed Development (Exhibit I).

37. In its decision denying Southview's appeal, defendants found that Southview satisfied all other Criteria but Criterion 8, relating to the impact of the Proposed Development on the deer yards identified by the Department. Defendants found that there existed a 44 acre deer yard on the Property and relying exclusively on the testimony of the Department, denied the permit because the proposed project would destroy part of that deer yard.

38. Defendants based their denial of Southview's appeal on their determination that the "opportunity to the public to hunt and observe deer and . . . the more intangible benefit of knowing that deer exist" were, in and of themselves, a sufficient public benefit to justify the denial of Southview's proposed use of its Property, and concluded that "the loss of deer in this area would be significant to the public who benefit from their existence".

39. Defendants further determined that, under Criterion 8, Southview's inability to obtain a return on its investment backed expectations in the Property due to the denial of its permit was irrelevant.

40. Both prior to and during the hearings held by the Commission and the then existing Board with respect to Southview's Act 250 Application, the Agency acting by and through the Department, actively pursued a denial of Southview's application because of the perceived detrimental effect on the deer yard, notwithstanding the Department's earlier representations to Southview, through its published Deer Yard Maps, that the Property did not contain a deer yard.

41. A timely appeal was taken of the Board's decision to the Vermont Supreme Court. The Court affirmed the Board's decision. In re Southview, 153 Vt. 171 (Exhibit J).

42. There are no variance procedures, or procedures in the nature of a variance, available under Act 250 and accordingly the decisions of the District 2 Environmental Commission, the Environmental Board and the Vermont Supreme Court constitute a "final decision" with respect to the Southview Property.

43. Because Southview is unable to develop its property, it has been unable to obtain a return on its reasonable investment backed expectations.

44. Because of its inability to obtain a return based on its reasonable investment-backed expectations, Southview has been unable to make payments to Cersosimo pursuant to the terms of the Cersosimo Mortgage.

45. On or about April 5, 1990, Cersosimo notified Southview that it was in default of its obligation and demanded a reconveyance of the Property in lieu of foreclosure. (Exhibit K).

46. If, as a result of Southview's default, Cersosimo elects to foreclose the Cersosimo Mortgage, Southview will suffer immediate

and irreparable harm by way of the loss of its property; the immediate and irreparable harm which Southview will suffer is the direct and proximate consequence of Defendants' wrongful acts, as set forth in this Complaint.

COUNT I

BY PREVENTING SOUTHVIEW FROM DEVELOPING ITS PROPERTY, AND REQUIRING INSTEAD THAT SOUTHVIEW MAINTAIN HABITAT FOR THE STATE'S DEER POPULATION, DEFENDANTS HAVE DEPRIVED SOUTHVIEW OF THE RIGHT TO EXCLUDE OTHERS, NAMELY THE DEER, FROM ITS PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 5th AND 14th AMENDMENTS OF THE UNITED STATES CONSTITUTION.

47. Paragraphs 1 through 46 are incorporated herein by reference.

48. As the owner of the Property, Southview possesses certain fundamental interests and rights including, but not limited to, the right to use, enjoy, possess and dispose of the Property as well as the right to exclude others from the Property.

49. Criterion 8A of Act 250, as applied to Southview's Property by the defendants have deprived Southview of its fundamental right to exclude "unwanted visitors", namely, the deer, from its Property.

50. The right to possess and/or exclude others from one's property is a fundamental right.

51. By refusing to allow Southview to develop its Property because of the deer yards purportedly located on the Property, Defendants have taken control over Southview's possessory interests in the Property including Southview's right to exclude others, namely the deer, from the Property.

52. Despite whatever public purpose Defendants may contend is served by compelling Southview to submit to occupancy of its Property by the State's deer herd, it is the nature of the intrusion into Southview's fundamental rights, that is, the deprivation of Southview's right to exclude the deer from its property, not the benefit derived by the State from the exclusion, that is at issue in this case.

53. Southview acknowledges that wildlife is regulated by the State under its sovereign, as distinct from its proprietary, capacity, and that the State has no duty to control the movements of wildlife or prevent wildlife from damaging private property. Under general principals applicable to wild animals, the State cannot be held responsible for damage done to Southview's property by the deer herd.

54. Southview is not, however, seeking damages or compensation for any damage caused by the deer; rather, it is seeking to protect its fundamental right to exclude others, including the deer, from its property, and to be reasonably undisturbed, at least in the possession of its property, by excluding unwanted intruders, whether they be humans or animals, from its property.

55. The forced occupancy of the property was undertaken by the defendants without providing Southview its due process rights under the 5th and 14th Amendments to the Constitution.

56. Southview has been damaged and continues to be damaged by the deprivation of its due process rights without a compelling state interest and in an arbitrary, capricious and irrational manner for which defendants are liable and for which Southview prays for an injunction to avoid the immediate and irreparable harm.

COUNT II

DEFENDANTS' ACTIONS IN THIS CASE, DENYING SOUTHVIEW THE RIGHT TO DEVELOP ITS PROPERTY IN ORDER TO COMPEL THE PRESERVATION BY SOUTHVIEW OF A HABITAT FOR THE USE AND OCCUPANCY BY THE STATE'S DEER HERD, CONSTITUTE A FORCED PHYSICAL INVASION OF SOUTHVIEW'S PROPERTY BY THE STATE; SUCH PHYSICAL INVASION HAS BEEN IMPOSED UPON SOUTHVIEW WITHOUT DUE PROCESS OF LAW AND WITHOUT SUBSTANTIALLY ADVANCING THAT "STATE INTEREST" IDENTIFIED IN 10 VSA SECTION 6086 (8)(A).

57. Paragraphs 1 through 56 are incorporated by reference.

58. According to the Deer Management Plan prepared and published by the Fish and Game Department, and adopted by the Agency of Natural Resources as a Rule, the deer herd in Vermont is "the property of the state".

59. By inference, the decision of the defendants in this case would compel Southview against its will and against its interest to submit to the permanent and continuous occupation of its property by the State's deer herd.

60. By denying Southview the right to develop its property in an otherwise lawful manner, by requiring Southview to preserve the deer yard located on the Property, and, by the clear inference which can be drawn from the prohibition against taking any action on the property which would exclude the migration of deer from neighboring lands onto the Southview property, Defendants have compelled and are compelling Southview, against its will and against its interest, to make its Property available for use by the deer herd and have forced Southview to submit to a physical occupation of its property by the deer herd, over which the State purports to maintain ownership, dominion and control.

61. Even though Defendants' appropriation of Southview's property for use by the deer herd does not result in the taking of fee title to or an express easement in the Property, the appropriation constitutes, at a minimum, an implied easement in favor of the State and its deer herd, and the taking of such "lessor servitude", if a valid taking, imposes on the Defendants the burden of paying just compensation for such "lessor servitude".

62. The denial by Defendants of an Act 250 Permit for the Proposed development under Criterion 8A is based solely upon the benefit derived by the public from Southview's maintenance of the deer yard located on its Property.

63. Southview does not desire, elect or consent to the use of its Property as a deer yard.

64. By their actions, Defendants have forced Southview to devote its Property to maintenance of the state's deer herd which, although serving the state's interest there, does not bear any relation to any economic purpose which could be reasonably contemplated by Southview or any other private investor in Southview's Property.

65. By requiring Southview to devote its Property to habitat for the state's deer herd pursuant to Criterion 8A for the benefit of the public, Defendants have forced Southview to bear a public burden which in all fairness and justice should be borne by the public as a whole.

66. The "public benefit" to be derived from such forced occupation or, conversely, from the prohibition against excluding others, including deer, from the Southview property deprives Southview of a fundamental right, without regard to whether the state action achieves an important public benefit or the economic impact on Southview.

67. In its application of Criterion 8 the Commission and the Board have placed Southview in the deer management business and by depriving Southview of the right to develop its property it has

forced Southview, against its will and against its interest, to remain in the deer management business.

68. As a material justification for depriving Southview of its right to develop its Property, Defendants have maintained that the deer herd is a valuable economic resource of the state which must be preserved and protected for hunting purposes, and that the revenues derived by the State from hunting licenses and related economic activities provide an economic benefit to the people of the State.

69. By depriving Southview of its right to develop, use or even exclude the deer from its property the State is acting in its enterprise capacity and has, in substance, taken unto itself Southview's private property for the state's commercial uses.

70. The clearly-expressed state interest set forth in Criterion 8A is to protect and preserve "necessary wildlife habitat", that is "habitat which is critical to the survival of the species".

71. As a species, the white tailed deer in Vermont are neither endangered nor threatened, nor is there any evidence to suggest that their habitat is being sufficiently diminished, either generally throughout the State or as a result of the proposed Development. White tailed deer occur in substantial numbers throughout the state of Vermont, and the slaughter of an unlimited number of male deer, and, periodically, a limited number of female deer and fawns, is encouraged each Fall by the same Department which opposes Southview's exclusion of deer from its property.

72. While the preservation of deer yards may foster some legitimate state purpose, such as preserving a State commercial activity based upon the annual, often indiscriminate, decimation of the deer population, Defendants have not found that, as a result of the development proposed by Southview, white tailed deer, **as a species**, would be threatened at any time during the year.

73. No finding was made by Defendants at any level of the proceedings below that the anticipated impacts from the Proposed Development would be "decisive to the survival" of the white tailed deer as a species, or even that any substantial number of white tailed deer, would be imperiled; at most the Defendants found that the habitat associated with the Proposed Development was occupied by a small number of deer and would be affected by the Proposed Development.

74. Nowhere in the record of the proceedings of the Commission or the Board is there suggested the kind of state interest, expressed in Criterion 8A, for protecting deer habitat in general, or the habitat of the five to seven deer which may, from time to time, occupy the Southview Property. The most compelling justification Defendants can find is the notion that the hunters might not have as many deer to kill, and "the [admittedly intangible] loss of the deer in this area would be significant to the public which benefit from their existence".

75. There exists no "rational nexus" between the application of Criterion 8A by the Defendants for preservation of Southview's property for the benefit of the State's deer herd, and the state interest in protection or preservation of habitat which is critical to the survival of a species, as expressed in Criterion 8A..

76. The deprivation of Southview's right to use, exclude and dispose of its Property by the Defendants to preserve habitat for a small number of white tailed deer fails to advance the state interest expressed in Criterion 8, that is, to protect endangered or threatened species or preserve habitat critical to the survival of a species because the burden imposed by the defendants does not substantially advance the defendant's putative purpose of protecting endangered species and, accordingly, Defendants' actions contravene the rights guaranteed to Southview under the 5th and 14th Amendments of the United States Constitution.

COUNT III

BY ALLOWING AND ENCOURAGING OTHER VERMONT PROPERTY OWNERS TO IMPERIL, ELIMINATE AND/OR EXCLUDE DEER FROM NECESSARY WILDLIFE HABITAT ON THEIR PROPERTIES, WHILE, AT THE SAME TIME, PREVENTING SOUTHVIEW FROM USING ITS PROPERTY BASED ON THE STATES DESIGNATION OF THE PROPERTY AS NECESSARY WILDLIFE HABITAT, DEFENDANTS HAVE WRONGFULLY DENIED SOUTHVIEW EQUAL PROTECTION OF THE LAW

77. Paragraphs 1 through 76 are incorporated herein by reference.

78. As previously pleaded in more detail, Southview possesses a fundamental right to use, exclude and dispose of its property.

79. Southview, as the owner of the Property, is within the class comprised of property owners in the State of Vermont.

80. As a member of the class of Vermont property owners proposing to subdivide and develop its property for residential purposes, Southview was subject to Act 250 jurisdiction, pursuant to which Defendants denied Southview's application for an Act 250 permit solely on the basis that Defendants defined portions of the Property as a "necessary wildlife habitat".

81. Other members of the class of Vermont property owners, who subdivide their property into fewer than ten lots within a five year period or who construct less than 800 feet of road for access to their lots, are not restricted or interfered within the subdivision or development of their properties, even though such subdivision or development may imperil or even completely eliminate deer yards located on the property.

82. Other members of the class of Vermont property owners, including loggers, orchardists and farmers, who develop their

properties for commercial enterprises related to logging, the growing of fruit and crops, pasturage, and related development are not subject to Act 250 jurisdiction, nor are they subject to any limitation on their use or development of their properties if their properties are identified as containing deer yards or deer wintering areas.

83. Other members of the class of Vermont property owners who develop their properties as commercial orchards are permitted to exclude deer from their properties, and the State, will, at the request of the property owner, pay for the fencing necessary to exclude the deer from their properties, notwithstanding that such fencing may interfere with deer habitat.

84. Defendants are without authority to prevent members of the class of Vermont landowners identified in the paragraphs above from excluding the deer from their property by destroying or impairing deer yards, even though such deer yards may be similar in character and importance as the deer yards identified on the Southview Property.

85. Had Southview chosen to undertake forestry, orchard and/or agricultural activities on its Property, including clear cutting and destruction of the entire habitat, it could have done so without violating Act 250. Likewise if Southview chose instead to clear the property for farming or to establish an apple orchard on the property it would not only have had the right but would have been entitled to State funds to pay the cost of fencing the property to prevent access by the deer.

86. Although the Defendants may contend that other less intensive and/or unregulated uses of the property are available to Southview, including logging, orchard or agricultural uses which do not require Act 250 review, such other uses, in and of themselves, may be inconsistent with the values which Defendants are purport-

ing to protect by denying Southview an Act 250 permit for the Proposed Development.

87. As set forth in Count I above, solely because Southview was required to obtain an Act 250 permit, the designation of the Property by Defendants as a "necessary wildlife habitat" has caused Southview to lose a fundamental right; namely, the right to possess the Property and/or exclude others from the property. It was only because Southview was required to obtain an Act 250 permit that the Defendant was able to compel Southview to maintain the property as a deer yard for the benefit of the state's deer herd.

88. Because Act 250 has been applied by the defendants in a discriminatory fashion, is facially invalid and Southview has been deprived of a fundamental right, Southview has been denied the Equal Protection of the laws in violation of the Equal Protection Clause of the 5th and 14th Amendments of the Constitution.

COUNT IV

THE DEER YARD DESIGNATION PROCESS, AND CRITERION 8 OF ACT 250, AS APPLIED IN THIS CASE, HAVE DENIED SOUTHVIEW ALL USE OF ITS PROPERTY AND HAS DEPRIVED SOUTHVIEW OF ALL REASONABLE INVESTMENT-BACKED EXPECTATION FROM ITS PROPERTY, WITHOUT PROVIDING ANY REMEDY OR COMPENSATION FOR THE TAKING

89. Paragraphs 1 through 88 are incorporated herein by reference.

90. Development of the Southview property as a 33 lot subdivision under the Proposed Development Plan would have been physically possible, financially feasible and legally permissible but for the denial of the development of the property by the Defendants under Criterion 8A.

91. At the time of the denial of Southview's Act 250 application by the Commission, building lots in the vicinity of Southview

in a substantially similar location and of the same general character as the Southview lots were selling for prices ranging between $100,000 and $130,000 a piece. Had a permit been granted to Southview for the Proposed Development, the cost of construction of the roads, sewer, utilities and other infrastructure and the cost of marketing the lots would have been approximately $1,155,000.

92. Based upon sales activity in the vicinity of the Southview subdivision at the time the Commission denied Southview's Act 250 permit, the 33 Southview lots in all probability would have sold within a three to five year period.

93. It was Southview's reasonable investment backed expectation that the Proposed Development of the Property would have resulted in profits to Southview of between $2,100,000 and $3,125,000.

94. Based upon the restrictions imposed on the future use and development of the Southview property as a result of the absolute rejection by the Defendants of a potential development of the Property, the Southview property has a nominal fair market value as of the date of this Complaint.

95. Southview invested in the Property at a level commensurate with its reasonable investment-backed expectation that the Property could be developed as a planned residential subdivision.

96. The application of Criterion 8 in this case to deny Southview the use of its property represents the use by the state of Vermont of its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be affected only through the power of eminent domain.

97. By designating Southview's property as a necessary wildlife habitat, the defendants have deprived Southview of all economically viable uses of that Property in relation to Southview's reasonable expectations that the Property would be developed as a planned residential subdivision, and have further prevented

Southview from earning a reasonable return on its investment commensurate with its reasonable investment-backed expectations.

98. Notwithstanding Southview's extensive effort to reduce the scale of the Proposed Development to satisfy the concerns of the Defendants with respect to the protection of the deer yards on the Property and enable Southview to obtain a reasonable return on their investment in the Property, the Defendants and the Department, from whom an agreement must be reached before a permit will be issued in these circumstances, refused to approve any configuration of the Proposed Development which would enable Southview to meet, or even reasonably approach, Southview's reasonable investment-backed expectations.

99. The actions of the Defendants in Counts I and II above constitutes a taking of Southview's fundamental rights, a physical invasion of Southviews' Property by the State, and a deprivation of Southview's reasonable investment-backed expectations resulting from development, use and sale of the Property.

100. Neither Act 250 nor any other provision of the Vermont Statutes provide a reasonable, certain or adequate provision for obtaining compensation, nor does the State provide any post-deprivation remedy for the loss by Southview of the use of its property and the deprivation of its reasonable investment backed expectations.

101. The taking of Southview's Property by Defendants without just compensation, combined with the failure to provide an adequate process for obtaining such compensation, constitutes a violation of Southview's rights under the 5th and 14th Amendments of the United States Constitution.

WHEREFORE, Southview prays for judgment against all Defendants as follows:

1. That the acts of the defendants be declared by the Court to be in violation of the Fifth and Fourteenth Amendments of the United States Constitution;

2. For injunctive relief enjoining the defendants from denying the permit and applying Act 250 in the unconstitutional fashion which it has;

3. For Southview's reasonable attorney's fees, costs and disbursements incurred herein;

4. For any and all other relief as this Court deems just and equitable.

Dated at Rutland, County of Rutland, State of Vermont, this 3rd day of August, 1991.

SOUTHVIEW ASSOCIATES
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.

BY:/s/ A. Jay Kenlan
A. Jay Kenlan, Esq.
A Member of the Firm

BY:/s/ Peter W. Hall
Peter W. Hall, Esq.
A Member of the Firm

BY:/s/ Carolyn Browne Anderson
Carolyn Browne Anderson, Esq.
A Member of the Firm

APPENDIX G

Relevant Statutes, Rules and Constitutional Provisions

Statutes

10 V.S.A. § 6001(12) (1984)

(12) "Necessary wildlife habitat" means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods.

10 V.S.A. §6081(a) (1984)

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage or transfer is accomplished to circumvent the purposes of this chapter.

10 V.S.A. § 6086(a)(8) (1984)

(a) Before granting a permit, the board or district commission shall find that the subdivision or development:

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party

opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

Rules

Environmental Board Rule 2

Rule 2. Definitions

(A) A project is a "development" if it satisfies any of the following definitions:

(1) Any construction of improvements, for any purpose, above the elevation of 2,500 feet;

(2) The constructions of improvements for any commercial or industrial purpose, including commercial dwellings, which is located on a tract or tracts of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. This

jurisdiction does not apply to construction for farming, logging, or forestry purposes below the elevation of 2,500 feet. In determining the amount of land, the area of the entire tract or tracts of involved land owned or controlled by a person will be used (Amended, effective March 11, 1982);

(3) The construction of a housing project or projects such as cooperatives, apartments, condominiums, detached residences, construction or creation of mobile home parks or trailer parks, or commercial dwellings with ten or more units constructed or maintained on a tract or tracts of land owned or controlled by a person within a radius of five miles of any point on any involved land within any period of time after June 1, 1970;

(4) The construction of improvements for state, county or municipal purposes, on a tract or tracts of land involving more than ten acres of land. The computation of involved land shall include the land which is incidental to the use such as lawns, parking lots, driveways, leach fields, and accessory buildings. In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or a part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction (Amended, effective March 11, 1982);

(5) Any construction of improvements which will be a substantial change of a pre-existing development, and any material change to an existing development over which the board or a district commission has jurisdiction;

(6) The construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or

tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included (Amended, effective March 11, 1982).

(7) Any exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material;

(8) The drilling of a well for the testing of an oil or natural gas reservoir, or for the extraction of oil or natural gas.

(B) "Subdivision" means a person's partitioning or dividing a tract or tracts of land into ten or more lots including all other lots which that person has created through subdivision within an environmental district, or within a five mile radius of any point of subdivided land if any lots have been created in any adjoining district, within any continuous period of five years after April 4, 1970. "Subdivision" shall also mean any material change of an existing subdivision over which a district commission or the board has jurisdiction and any substantial change to a pre-existing subdivision. A subdivision shall be deemed to have been created with the first of any of the following events (Amended, effective May 4, 1990)

(1) The sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease 10 or more lots. A person's intention to create a subdivision may be inferred from the existence of a plot plan, the person's statements to financial agents or potential purchasers, or other similar evidence;

(2) The filing of a plot plan on town records;

(3) The sale or offer to sell or lease the tenth lot of a tract or tracts of land owned or controlled by a person, when the lot is within an environmental district or within a five mile radius of any point on any other lot created by that person within any continuous period of five years after April 4, 1970 (Amended, effective May 4, 1990).

(C) "Commencement of construction" means the construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

(D) "Construction of improvements" means any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A). Activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits, (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearing for surveys may be undertaken without a permit, provided that no permanent improvements to the land will be constructed and no substantial impact on any of the 10 criteria will result. A district commission or the board may approve more extensive exploratory work prior to issuance of a permit after complying with the notice and hearing requirements of Rule 51 herein for minor applications.

(E) "State, county or municipal purposes" means projects which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.

(F) "Involved land" includes:

(1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and

(2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and

(3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.

In the event that a project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction (Amended, effective March 11, 1982).

(G) "Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(1) through (a)(10).

(H) "Person" means an individual, partnership, corporation, association, unincorporated organization, trust or any other legal or commercial entity, including a joint venture or affiliated ownership which owns or controls the tract or tracts of land to be developed or subdivided. The word "person" also means a municipality or state agency.

(I) "Dwelling" means any building or structure or part thereof, including but not limited to hotels, rooming houses, dormitories and other places for the accommodation of people, that is intended to be used and occupied for human habitation.

(J) "Lot" means any undivided interest in land, whether freehold or leasehold, including but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts.

(K) "Party" means any person designated as a party under the act or these rules and includes the applicant.

(L) "Commercial purpose" means the provision of facilities, good or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value (Added, effective July 15, 1974).

(M) "Commercial Dwelling" means any building or structure or part thereof, including but not limited to hotels, motels, rooming houses, nursing homes, dormitories and other places for the accommodation of people, that is intended to be used and occupied for human habitation on a temporary or intermittent basis, in exchange for payment of a fee, contribution, donation or other object having value. The term does not include conventional residences, such as single family homes, duplexes, apartments, condominiums or vacation homes, occupied on a permanent or seasonal basis (Added, effective March 11, 1982).

(N) "Pre-existing subdivision" shall mean a subdivision exempt under the regulations of the department of health in effect on January 1, 1970 or any subdivision which had a permit issued prior to June 1, 1970 under the board of health regulations, or had pending a bona fide application for a permit under the regulations of the board of health on June 1, 1970, with respect to plans on file as of June 1, 1970 provided such permit was granted prior to August 1, 1970.

(O) "Pre-existing development" shall mean any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

(P) "Material change" means any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

Constitutional Provisions

Vermont Constitution

Article 2nd. [Private property subject to public use; owner to be paid]

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Article 4th. [Remedy at law secured to all]

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right in justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

No. 92-1273 (2)

In The

Supreme Court of the United States

October Term, 1992

SOUTHVIEW ASSOCIATES, LTD.,
SOUTHVIEW AT STRATTON PARTNERS,

Petitioners,

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD; FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

State of Vermont
JEFFREY L. AMESTOY
Attorney General

RONALD A. SHEMS
Assistant Attorney General
Counsel of Record

JOHN H. HASEN
Assistant Attorney General
Of Counsel
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-3171

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

On October 30, 1992, the Second Circuit Court of Appeals affirmed the dismissal of the Complaint of the Petitioner, Southview Associates, Ltd. and Southview at Stratton Partners (Southview), on the grounds that Southview failed to allege a proper "takings" claim. *Southview Associates et al. v. Bongartz et al.*, 980 F.2d 84 (2d Cir. 1992) (Oakes, C.J.).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

1. The Respondents have not deprived Southview of any fundamental right.

2. The Respondents have not engaged in the "physical occupation" of Southview's property; rather, this matter involves a "regulatory" taking claim which is not ripe for review.

3. The State of Vermont provides an adequate method by which Southview may seek compensation for the alleged taking.

4. The Eleventh Amendment precludes federal court jurisdiction over Southview's claim.

ARGUMENT

To persuade this Court to grant certiorari, Southview argues that the "decision of the Court of Appeals is in conflict with the decisions of this Court. . . . " Pet. 9. *See*

Rule 10.1(c). Southview premises this argument on three fallacies: first, that it has been deprived of its "fundamental right to exclude . . . deer from its property;" Pet. 9; second, that 44 acres of its land has been taken, "in perpetuity, for the benefit of the State's deer herd;" *id.*;[1] and, third, that Vermont law does not provide an adequate procedure for obtaining compensation for such a taking. *Id.* at 10.

Upon exposing each fallacy, it becomes clear that the Court of Appeals acted in full conformity with this Court's decisions relating to the issues raised by Southview.

I. SOUTHVIEW HAS NOT LOST ANY FUNDAMENTAL RIGHT

A. The Respondents have not deprived Southview of its "fundamental right" to exclude deer from its property.

Southview states that "this case arises out of Respondents' deprivation of Petitioners' fundamental right to exclude . . . deer from its property. . . . " Pet. 9. But this case simply involves the denial of a permit for a particular project.

Southview applied for a permit pursuant to Vt. Stat. Ann. Tit. 10, Ch. 151 ("Act 250") to build 33 houses on 88 acres of land which it owned in Stratton, Vermont. Pet.

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[1] Southview's Petition also mischaracterizes the nature of this matter and inaccurately portrays the Second Circuit's opinion, asserting that it condones a taking by the State of Vermont in violation of Southview's property rights.

App. D4, F8-F9. The Vermont Environmental Board, applying statutory criteria, denied a permit for the proposed project because it would imperil or destroy a "necessary wildlife habitat," namely a deeryard. Vt. Stat. Ann. tit. 10, §6086(a)(8)(A) (1969). Pet. App. D8-D14; F10, ¶37. The Vermont Supreme Court affirmed the Environmental Board's decision. *In re Southview Associates,* 153 Vt. 171, 569 A.2d 501 (1989).

Even if the "right to exclude deer" were to be considered a "fundamental right," the Board's permit denial did not cause deer to "invade" or "physically occupy" Southview's land. Nothing in the Board's decision requires Southview to submit to the presence of deer on its property "in perpetuity." Nor does its decision, or any other provision of Vermont law, prohibit Southview from excluding deer from its land. Southview can fence its land. Pet. App. A19. Southview's owners can hunt the deer. *Id.* Southview can, (and, indeed, recently *did*) log the deeryard,[2] *id.;* Vt. Stat. Ann. Tit. 10, §6001(3) (1969), thereby causing the deer to leave the land. In short, Southview's assertion that the Respondents have infringed upon Southview's purported "right to exclude" is not true.

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[2] Of course, if logging or constructing a fence is the prelude to an Act 250 "development," or "subdivision," Vt. Stat. Ann. Tit. 10, § 6001(3), (19) (1969), then a permit is required.

B. The decision of the Court of Appeals does not divest Southview of any "fundamental right."

Southview argues that the Court of Appeals' decision "established, as its rule of law," that landowners "must be prepared to surrender their property rights for the privilege of seeking a land use permit." Pet. 11-12. But again, the decision states no such thing. Judge Oakes merely reasons that Southview's application for a permit places this case, if anywhere, into the category of a possible "regulatory" takings claim.[3] Pet. App. A16-A21. Southview's argument that the Second Circuit somehow tramples its rights under hoof by imposing a draconian requirement for those who wish to apply for permits is unfounded, if not misleading.

Further, despite Southview's assertion that the Court of Appeals condones substantive due process violations and a taking by the Respondents, Pet. 15-22, it is evident that the Second Circuit never reaches these contentions. Rather, the decision of the Court of Appeals is a simple one: this case involves allegations of a "regulatory taking," Pet. App. A21, which, under the two-part test in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), are not yet ripe for review. Pet.

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[3] In this regard, Southview misinterprets Judge Oakes' mention of *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). Pet. 12-14. Even a cursory reading of the decision indicates that Judge Oakes notes *Yee* merely to complement his analysis that, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this case does not involve a "physical occupation" taking. Pet. App. A16-A21.

App. A21-A32.[4] In so holding, the Second Circuit follows an unbroken line of authority from this Court on the matter of ripeness in regulatory takings cases. Southview does not argue to the contrary.

The imaginary holdings conjured in Southview's Petition might conflict with takings decisions of this Court. The decision of the Court of Appeals does not. Southview's argument that "[t]he decision of the Court of Appeals does such violence to settled law, as expressed in precedent decisions of this Court," Pet. 11-12, is wholly without merit.

C. This matter involves only allegations of a "regulatory" taking, not a "physical occupation" taking.

As it did before the District Court and the Court of Appeals, Southview seeks to avoid settled ripeness standards by mischaracterizing its Complaint as one involving a "physical occupation" of its property. Pet. 11. Southview has not pled – nor could it – that the Respondents have authorized any occupancy, however slight, of the Southview property. Nor can Southview allege – as in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) – that the Respondents have conditioned permit approval on the grant of an easement to authorize *persons* "to pass to and fro," *id.* at 832, over Southview's property.

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[4] To the extent that Southview also raises substantive due process claims, the Court of Appeals finds that these interests are also subject to the *Williamson* requirements. Pet. App. A23-A25.

Instead, Southview advances a theory (which may be charitably described as "novel") that it has a ripe takings claim because the Respondents have required it "to submit to the permanent physical occupation of [its] property by the *deer*. . . . "[5] Pet. 16 (emphasis added). Even if Southview's argument could be supported by a plausible reading of takings jurisprudence, its assertion is without foundation within the confines of its own pleadings.

Southview affirmatively pleads that there were deer on its property prior to its submission of an Act 250 permit application. Pet. App. F17, ¶74. Southview pleads that "the State has no duty to control the movements of wildlife," Pet. App. F13, ¶53. Southview also pleads that Vermont property owners "are permitted to exclude deer from their properties," Pet. App. F19, ¶83, and, indeed, may in some instances secure state funding for fences. *Id.*, ¶85. It is upon these pleadings[6] and its theory of takings

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[5] The absurdity of Southview's "physical occupation" claim must be considered in light of its logical extension: were this case to be determined to be a "physical occupation," then all cases involving regulatory restrictions on land would be "physical occupations;" there would be no need for the distinction – most recently recognized in *Yee* – between "physical occupation" and "regulatory" takings. All setback requirements in zoning ordinances would be "physical occupations" by trees, grass, insects and worms; the building height limitations imposed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), would be "physical occupations" by air and birds; a rule that prohibited the draining of a wetland would be a "physical occupation" by water.

[6] Southview also alleges that it may presently enter upon and possess all of its land; it may "undertake forestry, orchard and/or other agricultural activities" Pet. App. F19, ¶85, "subdivide [its] property into fewer than ten lots," and that, in so

that Southview premises questions of law deserving of a grant of certiorari. The response of this Court to appellants' claim in *Yee* is equally appropriate here: "Put bluntly, no government has required any physical invasion of petitioners' property." 112 S.Ct. at 1528.

As much as Southview may strain to contrive a "physical occupation" claim, this matter involves land use regulation.[7]

II. NO TAKING HAS OCCURRED

Southview's second premise is that the Respondents have "accomplished a complete taking of 44 acres of Petitioners' property," Pet. 22, "in perpetuity, for the benefit of the State's deer herd." Pet. 9. But Southview's contentions are without foundation for three reasons.

First, this case involves the denial of Southview's solitary permit application to build a particular project. There may be many other projects that Southview may be able to construct under Act 250; indeed, as both the District Court, Pet. App. B6, and the Second Circuit note, Pet. App. A28, Southview remains free, and, indeed, was

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doing, it may dispose of its property without restriction or interference. Pet. App. F18, ¶81. Applying *Loretto*, the Court of Appeals holds that these allegations, along with the limitations on Act 250 jurisdiction, *see* Part II, *infra*, mean that Southview retains possession, control, and the value of its property and thus no "physical occupation" has occurred. Pet. App. A19-A20.

[7] In this regard, Southview's use of the phrase "go too far," Pet. 14, is telling, as this is language from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922), a *regulatory* takings case.

invited by the Respondents, Pet. App. D13, to propose the development of other portions of its 88 acre tract that would have a lesser impact on the deeryard. What Southview cannot do "is build the exact residential subdivision for which it sought an Act 250 permit." Pet. App. A45. Because other projects may be approved, Southview has not yet established that a taking has occurred. *See Penn Central.*

Second, as Judge Oakes notes, because Act 250 has limited jurisdiction, Southview is free to develop and use its entire parcel in ways that do not trigger Act 250 review. Pet. App. A45. Southview is free to put its property to a myriad of uses, many of which could provide substantial economic profit. *Id.*

Third, the section of Act 250 under which Southview's permit was denied is limited by a cost-benefit analysis. Vt. Stat. Ann. Tit. 10, §6086(a)(8)(A)(i) (1969); Pet. App. G1-G2. The Respondents determined that the:

> loss to the public from the destruction and imperilment of the habitat is not outweighed by the economic, social, cultural, recreational or other benefit from the project . . . The Board is not persuaded that the Applicant has thoroughly investigated the possibility of less intensive development in other areas of the site.

Pet. App. D11-D13. Other proposals may change this analysis; Southview can either reconfigure its plans to lessen the loss, or propose a project with greater "economic, social, cultural, recreational or other" benefits. Southview's assertion, therefore, that it has been

deprived of all economic use of its property is, quite simply, not true.[8]

III. SOUTHVIEW'S ARGUMENTS PERTAINING TO ADEQUATE MEANS FOR COMPENSATION DO NOT PROVIDE A BASIS FOR GRANTING CERTIORARI

Southview's final argument is that "neither Act 250 nor any other provision of Vermont law provides a reasonable, adequate and certain means for obtaining compensation for the taking of Petitioners' property." Pet. 23-29; *see Williamson*, 473 U.S. at 194. Despite this assertion, however, on November 30, 1992, Southview filed an action in state court seeking compensation for the alleged taking. *Southview Associates v. State of Vermont et al.*, No. S753-92 WnC (Vt., Wash. Sup. Ct.). The question of whether Vermont provides an adequate procedure for Southview to seek compensation is therefore presently pending before Vermont's courts. Southview cannot assert an inadequate remedy until its demand for compensation has been denied pursuant to a final order dispositive of this issue.[9]

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[8] This case is therefore not similar, in any fashion, to the recent decision in *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886 (1992), where the Court held that the plaintiff had lost all use of his property as result of the state's regulations.

[9] The Second Circuit's October 30, 1992 decision holds that Southview must first file "a suit in state court . . . before it asserts a section 1983 claim [in federal court] based on a regulatory taking." Pet. App. A32. Southview's recent state court filing effectively renders moot the Petition's claimed error with the

Southview also renews the argument raised to the Second Circuit that a provision for obtaining compensation is "reasonable, adequate and certain" only if it is established by *statute*. Pet. 24-26. The Court of Appeals rejected this limited reading of the *Williamson* requirement, deciding instead to follow the reasoning of the Ninth Circuit in *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-1 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), the First Circuit in *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 513-15 (1st Cir. 1987), and the Eighth Circuit in *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986). *See* Pet. App. A30. There is thus no disagreement among the Circuits on this point.

Next, Southview argues that, "[w]hen the government has not provided an adequate *process* for obtaining compensation, that fact alone should lead to the conclusion that the property owner has been denied both Due Process and Just Compensation." Pet. 24 (emphasis in original). Before the Second Circuit, Southview argued only that the lack of such a remedy meant that it did not need to comply with *Williamson's* second ripeness requirement. *See* Pet. App. A29-A32. At no time did Southview ever argue below that Vermont's alleged failure to provide a process was itself a denial of "Due Process and Just Compensation." This Court generally adheres to the rule that it will not entertain issues that were not raised below. *Yee*, 112 S.Ct. at 1531. Southview

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Second Circuit's language which requires the use of state compensation remedies.

advances no reason why this rule should not be followed in this instance.[10]

Finally, Southview argues that the Vermont Supreme Court has determined that, "in the absence of a *specific statutory provision* for compensation, the remedy for a regulatory taking is to *strike down* the regulation." Pet. 27 (citing *Foster v. Stafford Nat'l Bank*, 57 Vt. 128, 5 A. 890 (1884); emphasis in original). This assertion is frivolous.[11] The century old *Foster* case was *not* a regulatory takings case. It was a case in which a state statute gave condemnation authority to a private corporation, but no provision was made for the corporation's payment for lands it condemned. Under those circumstances, the Court held the statute unconstitutional.

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[10] Nor does Southview point to any authority in support of its new argument. Indeed, even assuming that Vermont fails to provide a process by which compensation can be sought, the sole ramification of such a failure is that Southview does not have to satisfy the second ripeness test in *Williamson*. But to hold that such a failure of process, by itself, means that the Just Compensation clause is violated leads to the absurd result that a violation can be found without the necessity that a claimant first prove that a taking has occurred.

[11] Even if Southview's reading of Vermont case law were correct, then this would be yet another reason why Southview should go first to the state courts for relief: if the offending regulation is invalidated by the state courts, Southview will be allowed to construct its project as it pleases, and no taking will occur. Consequently, there will be no violation of the federal constitution, and recourse to the federal courts will be unnecessary.

In any event, Vermont law requires compensation[12] for a taking: "[W]henever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. Ch. I, art. 2; Pet. App. G8. What Southview characterizes as "the formidable task of developing a constitutional remedy each time the State effects a taking," Pet. 10, is, in reality, simply an action at common law. *Eno v. City of Burlington*, 125 Vt. 8, 16, 209 A.2d 499, 506 (1965) (common law provides the requisite machinery to secure full vindication of rights provided by the Vermont Constitution).

Southview's argument boils down to a contention that *it need not even try* to seek compensation through any non-statutory state process before asserting its rights under the Just Compensation clause. Ironically, it is Southview's argument that is contrary to settled precedent: because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. *Williamson*, 473 U.S. at 195.

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[12] There is no reason to believe that Vermont courts would not follow the general rule that equitable relief is not available where there is an adequate remedy at law. *See Campbell Inns, Inc. v. Banholzer*, 148 Vt. 1, 7, 527 A.2d 1142, 1146 (1987).

IV. FEDERAL COURT JURISDICTION IS BARRED BY THE ELEVENTH AMENDMENT

Even if a taking had occurred which was ripe for review, this case would be barred by the Eleventh Amendment.

While captioned as a suit against the "individual" members of the Vermont Environmental Board, Southview did not serve any individual defendants, nor have any individual defendants appeared in this matter. R. 2, 3. Rather, Southview served the Summonses and Complaints on Vermont's Deputy Attorney General.[13] R. 2; F.R.Civ.P. 4(d)(6); Vt.R.Civ.P. 4(d)(2). Service was acknowledged and appearances were made on behalf of the defendants in their official capacities only. R. 2, 3. No further service was attempted or perfected.

An action against members of the Environmental Board in their official capacities "is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). To sustain an official capacity suit, a plaintiff must overcome those "forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. *See also, Hafer v. Melo,* 112 S.Ct. 358, 361-62 (1991).

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[13] Southview named the *current* members of the Environmental Board as defendants. Only *three* of the eight named defendants participated in the Board's denial of Southview's permit application. *Compare* Pet. App. D14 with Pet. App. A1. There is thus no basis in fact or law to sue all current members of the Board in their individual capacities.

The Eleventh Amendment limits federal jurisdiction over official capacity suits to a grant of prospective injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974); *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984). Declaratory relief cannot issue unless it is accompanied by a grant of prospective injunctive relief. *Green v. Mansour*, 474 U.S. 64 (1985).

Southview's request for injunctive relief is limited to its prayer that the Board be enjoined "from denying the permit and applying Act 250 in the unconstitutional fashion which it has." Pet. App. F23. As Southview clearly alleged, *the permit has already been denied.* Pet. App. F10, ¶36. Any such injunctive relief would be retroactive. Southview is not seeking prospective injunctive relief.

Furthermore, Southview attempts a grievous circumvention of the Eleventh Amendment by demanding declaratory and injunctive relief rather than compensation, Pet. App. F23, for an alleged taking. A state may reconcile its actions with the takings clause of the Fifth Amendment by either not taking land for public purposes *or* providing just compensation for such a taking. *See Williamson*, 473 U.S. at 195. If Vermont's administration of Act 250 results in a taking, Vermont may choose to pay just compensation. Or, Vermont may choose to limit Act 250 so as to never cause a taking. Either choice conforms to the Fifth Amendment. *Id.*

The authority to make such a choice is vested exclusively with the State of Vermont. Vermont retains the sovereign right to legislate, interpret and administer its own laws. *See Pennhurst*, 465 U.S. at 106: "[I]t is difficult

to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

Southview's requested injunctive and declaratory relief, if granted, would eliminate the alleged taking without allowing Vermont the opportunity to provide just compensation. Thus, despite the absence of an infirmity under the takings clause of the Fifth Amendment, a federal court would deny Vermont its prerogative to choose the application of Act 250 which best suits its needs. It would establish an interpretation of Act 250 contrary to that enunciated by Vermont's Supreme Court in *In re Southview Associates* and instruct the state to comply with that interpretation.

Such federal interference with the interpretation and administration of Vermont laws is precisely what the *Pennhurst* Court found offensive to the Eleventh Amendment and principles of federalism. Jurisdiction over this matter, insofar as Southview alleges a taking, is thus barred by the Eleventh Amendment.

CONCLUSION

The Respondents respectfully request that the Petition for Certiorari be denied.

State of Vermont

JEFFREY L. AMESTOY
Attorney General

RONALD A. SHEMS
Assistant Attorney General
Counsel of Record

JOHN H. HASEN
Assistant Attorney General
Of Counsel

Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171
Attorneys for Respondents

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No. 92-1273

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SOUTHVIEW ASSOCIATES, LTD.,
SOUTHVIEW AT STRATTON PARTNERS,
Petitioners

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD; FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

A. JAY KENLAN, ESQ.
Counsel of Record
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.
71 Allen Street
Rutland, VT 05702-0578
(802) 773-3300
Attorneys for Petitioners
Southview Associates, Ltd.,
Southview at Stratton Partners

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Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

Although much of Respondents' Brief is conclusory and does not warrant reply, several of the arguments advanced by Respondents evidence a fundamental misunderstanding of constitutional principles which have been established by this Court, but which have been abridged or largely ignored by Respondents and by the Court of Appeals. Left uncorrected, the direction in which the decision of the Court of Appeals below leads takings jurisprudence will only result in more confusion, more controversy, and the further erosion of constitutionally-protected property rights.

POINTS IN REPLY

I. *WILLIAMSON* REQUIRES BOTH "A REASONABLE, CERTAIN AND ADEQUATE MEANS OF COMPENSATION" AND COMPENSATION ITSELF TO SATISFY THE DUE PROCESS AND JUST COMPENSATION REQUIREMENTS OF THE FIFTH AMENDMENT.

Respondents' assertion, that "no constitutional violation occurs until just compensation has been denied", Pet. Brief at 12, reads too little and too much into the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). It is evident that neither Respondents nor the Court of Appeals recognize that the Court, in *Williamson,* establishes a two-part analysis to determine whether the Just Compensation clause has been satisfied. The *Williamson* analysis begins with a determination of whether a "'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking", *id.* at 194, to compensate the property owner whose property has been taken. Only when it is determined that a "reasonable, certain and adequate provision" for obtaining compensation has been provided does the analysis turn to whether compensation has, in fact, been paid. Only then does the Court in *Williamson* conclude that "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. Although not expressly stated in its decision, it is evident that the Court, in *Williamson*, viewed the Just Compensation clause as having both a substantive component and a procedural component; substantive to the extent that a "reasonable, certain and adequate" means of obtaining compensation must be provided, procedural to the extent that the property owner who has suffered a taking must

seek compensation in accordance with such procedures. The availability of a "reasonable, certain and adequate" procedure to obtain compensation is as important to the concept of Just Compensation as the compensation itself[1].

The Court's decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987) and *Williamson*, and the Vermont Supreme Court's decision in *Foster v. Stafford Nat'l Bank*, 57 Vt. 128, 5 A. 890 (1894), are easily reconcilable and clearly consistent with respect to the substantive and procedural components of the Williamson analysis. In *Williamson*, the Court required that compensation must be provided pursuant to a reasonable, certain and adequate procedure. Although *Williamson* tells us that a taking has not occurred until compensation has been denied, the Court in *First English* concludes that, under the self activating character of the Just Compensation clause, no property owner whose property has been taken can be

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[1] In their Brief, Respondents state that "[a]t no time did Southview ever argue below that Vermont's alleged failure to provide a process was itself a denial of "Due Process and Just Compensation." Resp. Brief at 10. Not only do Respondents misstate the record (*see, e.g.*, Pet. App. F22, ¶101), they ignore this Court's pronouncement in *Yee v. City of Escondido*, 118 L. Ed. 2d 153 (1992) that "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." *Yee*, 118 L. Ed. 2d at 170. From the filing of the Complaint to the filing of the Petition, Petitioners have consistently and steadfastly maintained that Respondents actions have deprived them of their substantive Due Process rights guaranteed under the Fifth Amendment. It is Respondents' fundamental misunderstanding of the constitutional concept of substantive Due Process, and not any defect in Petitioners' pleadings, which appears to confuse Respondents about the nature of Petitioners' claims.

denied compensation[2] (assuming that the governmental action does not come within the nuisance exception addressed by this Court in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798 (1992)). It is evident that *Williamson's* reference to a 'denial of compensation' which would give rise to a taking is not necessarily limited to a procedural denial of compensation, since a procedural denial of compensation could not occur under the Court's rationale in *First English*. Read together, *Williamson* and *First English* establish that the failure to provide a reasonable, certain and adequate means of compensation is the effective equivalent of a substantive denial of compensation, and a substantive violation of the rights guaranteed to Petitioners under the Fifth Amendment. *Williamson* and *Foster* are in complete accord; *Foster* effectively

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[2] While *First English* is often relied upon for the proposition that compensation, not invalidation, is the appropriate remedy for a regulatory taking, it is evident that the Court in *First English* did not intend to preclude invalidation as a remedy for a constitutionally-defective law or act. *First English*, 482 U.S. at 319. While, as Respondents observe, "[i]f Vermont's administration of Act 250 results in a taking, Vermont may choose to pay just compensation. Or, Vermont may choose to limit Act 250 so as never to cause a taking", Resp. Brief at 14, Vermont need only make its choice "[o]nce a court has determined that a taking has occurred". *First English*, 482 U.S. at 321. Petitioners are asking the Court to make the constitutional determination that Respondents' actions in this case have resulted in a taking of Petitioners' property in violation of both the Due Process and Just Compensation provisions of the Fifth Amendment. Once that determination has been made, Vermont must then make its election with respect to any future application of Criterion 8 of Act 250 to the Southview Property.

applies the *Williamson* analysis by striking down as constitutionally defective a state law which results in a taking but does not provide a 'reasonable, certain and adequate' means of compensation.[3]

The Court of Appeals, in its decision below, confirms that no statutory compensation remedy for Respondents' taking of Petitioners' property exists under Vermont law. Instead, the Court of Appeals and Respondents maintain that Article 2 of the Vermont Constitution provides to Petitioners whatever "remedy" is available under Vermont law. *Foster* tells us, however, that in Vermont, the remedy for a law which effects a taking of property but does not provide a compensation remedy is invalidation, not compensation, and neither Judge Oakes nor Respondents offer any contrary authority.[4]

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[3] Petitioners do not contend that the Vermont Supreme Court, in *Foster*, was clairvoyant and anticipated the Court's decision in *Williamson*, only that the constitutional premise upon which the "century old" *Foster* decision was based is entirely consistent with the modern view of this Court in *Williamson*.

[4] While, as Respondents observe, *Foster* is a "century old" case, neither Respondents nor the Court of Appeals cite any authority which indicates a modification of the court's decision in *Foster* that "any legislative act authorizing . . . an appropriation [of private property] . . . which does not provide for compensation, is plainly in conflict with the Constitution." *Foster*, 57 Vt. at 133, 5 A. at 895. Respondents' citation to *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965), as authority for the proposition that "the common law provides the machinery to secure full vindication of rights provided by the Vermont Constitution", Brief at 12, conveniently overlooks the fact that the reference in *Eno* to the availability of "common law machinery" refers specifically and exclusively to remedies available under § 28 of Chapter II of the Vermont Constitution (relating to access to the courts). *Eno*, 125 Vt. at 16, 209 A.2d at 506. Nothing in *Eno* suggests any intent to modify the Court's holding in *Foster*, that it was unnecessary "to decide whether, upon the facts stated, the use for which the orator was authorized to appropriate the property, was public

Accordingly, no compensation is available to Petitioners under Vermont law, and both *Foster* and *Williamson* mandate the invalidation of Respondents' application of Criterion 8 of Act 250 to future applications for development of the Southview Property.

II. PETITIONERS' FILING OF A STATE COURT COMPENSATION CLAIM DOES NOT RENDER THIS PETITION MOOT.

Respondents argue that the filing by Petitioners of a compensation claim in the Vermont Superior Court somehow renders moot the continuation of Petitioners' action to enjoin Respondents' unconstitutional application of Criterion 8 of Act 250. What Respondents steadfastly refuse to acknowledge, however, is that, for almost eight years, Respondents' actions have deprived Petitioners of their constitutionally-protected property rights in violation of both the Due Process and Just Compensation provisions of the Fifth Amendment. In their federal court complaint, Petitioners have sought invalidation of Respondents' application of Criterion 8 of Act 250, however, "[i]nvalidation . . . after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, 482 U.S. at 319. Petitioners have brought their state court compensation claims against Respondents not pursuant to any state compensation remedy (since no such remedy exists), but under the "self-executing character of the constitutional provision with respect to compensation", *id.* at 315, to recover compensation for the effects of Respondents' unconstitutional application of Criterion 8 of Act 250.

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use or not; as the failure to make compensation or to give such security for its payment, as the law requires, rendered the act unconstitutional." *Foster*, 57 Vt. at 134, 5 A. at 896. *Foster* may be <u>old</u> law, but it is <u>good</u> law!

It is Petitioners' hope and belief that this Court will grant their Petition and determine that the actions of Respondents have resulted in a constitutionally impermissible taking of Petitioners' property. Time is passing, however, and to avoid any argument by Respondents that Petitioners have failed to perfect their compensation claims against Respondents within applicable statutes of limitation, Petitioners filed their state court compensation claim in anticipation of a decision of this Court.[5] While the filing of the State court action by Petitioners may appear to the Court to be presumptuous, Petitioners submit that, under the circumstances of this case, the decision to file their State court claims prior to a decision by this Court was simply prudent.

Here, the relief sought by Petitioners is exclusively declaratory and injunctive in nature, and is of an entirely different character than Petitioners' state court compensation claim. Petitioners seek from this Court a determination that the actions of Respondents are constitutionally impermissible. Such a determination will make the state court compensation claim filed by Petitioners "a living and not a hypothetical controversy." *Collins v. Porter*, 328 U.S. 46, 49 (1946). While, as the Court observes in *Collins*, it is "powerless to decide a case if its decision 'cannot affect the rights of the litigant before it'", *id.* at 48, here, as in *Collins*, a decision by the Court on Petitioners' claims will clearly "affect the rights" of Petitioners and Respondents.

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[5] It is noteworthy that Petitioners and Respondents have, by agreement, advised the state court in which the compensation claim was filed to stay any further action on the state court compensation claim until this Court makes a determination with respect to this Petition.

III. PETITIONERS' CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

The record of this case, the decision of the Court of Appeals and the Brief of Respondents leave no doubt that any Act 250 Permit for any future development of the Southview Property will require the applicant to forego any development which might exclude deer from the Southview Property. Moreover, as the record clearly demonstrates, any future development of the Southview Property requiring an Act 250 permit will only be approved by Respondents for the portion of the Southview Property other than the 44 acres of deeryard.

Petitioners' claims for declaratory and injunctive relief against Respondents, to prevent them from acting in their official capacity and under color of State law to deprive Petitioners of their constitutional rights, have long been recognized by this Court as appropriate and consistent with the Eleventh Amendment. In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten . . . an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* at 155-56. Here, as in *Ex Parte Young*, Respondents have acted (and have evidenced their intent to continue to act) in their official capacity, as members of the Vermont Environmental Board, to apply Criterion 8 of Act 250 to prevent any development which would cause the deer to be excluded from the Southview Property, and to require that half of the Southview Property be maintained in its natural state as a condition of the development of any other portion of the Southview Property.

In their brief, Respondents, relying on *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), contend that the Eleventh Amendment requires that Vermont retain the "sovereign right to . . . administer its own laws", Resp. Brief at 14, and assert that Petitioners' action seeks to "instruct[] state officials on how to conform their conduct to state law". *Id.* at 106[6]. The Court in *Pennhurst*, however, recognized an important exception to this general rule: that "a suit challenging the constitutionality of a state official's action is not one against the State", *id.* at 102, and observed that while "[t]his rationale . . created the 'well recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment . . . [t]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority' of the United States." *Id.* at 104-05. Here, Petitioners seek only to have Respondents conform their conduct to the Federal Constitution, under principles established by this Court in *First English, Loretto, Williamson, Nollan* and *Lucas*.

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[6] In their Brief to the Court of Appeals, Respondents maintain that the "Eleventh Amendment precludes a federal court from instructing a State on the interpretation and administration of State law in the absence of a constitutional infirmity." (Defendants' Brief at 39-40) It is the constitutional infirmity of Respondents' actions which is central to this case and which distinguish Petitioners' claims from claims which might otherwise contravene the Eleventh Amendment, and the only "instruction" which Petitioners seek is to have Respondents comply with the Federal Constitution.

CONCLUSION

For the reasons cited in the Petition and this Reply Brief, the Petition for a Writ of Certiorari should be granted.

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A. JAY KENLAN, ESQ.
Counsel of Record
ABELL, KENLAN, SCHWIEBERT & HALL, P.C.
71 Allen Street
Rutland, VT 05702-0578
(802) 773-3300
Attorneys for Petitioners
Southview Associates, Ltd.,
Southview at Stratton Partners